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The Origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair

John W Cairns^{*}

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A. INTRODUCTION

On Tuesday 11 February 1707, while the Scottish Parliament was still in session (if not sitting on that particular day), Queen Anne by her sign manual converted the income supporting fifteen bursaries in divinity into an endowment to support a chair in law in the University of Edinburgh. The letters patent claimed that this was done because “it now becomes of more use and benefite to our ancient kingdom to Establish and setle a ffoundation for a Constant professor of the publick law and the law of nature and nationes”. The bursaries had been funded from the “Bishops’ Rents”.¹ The Bishops’ Rents were the income from land that had been allocated to support the episcopacy of the Scottish church after its restoration under Charles II. On the establishment of Presbyterianism, these had reverted to the Crown, and King William had granted some of the income to support the Scottish universities, in particular in Edinburgh to endow twenty bursaries in divinity.² Since this had been an allocation made by the Crown, it was necessary for Queen Anne to reassign the funds supporting fifteen of these to endow the new chair, and the patronage rested with the monarch.

The creation of the first chair in law in Edinburgh took place during the intense national arguments over the Union.³ Over the last three months of 1706, the Scottish Parliament had debated the articles of Union with England.⁴ On January 16 1707, Parliament voted in favour of the Act ratifying the Treaty of Union.⁵ Business continued through February and March until, on 25 March, Parliament adjourned to meet again on 22 April. The Commissioner’s speech on 25 March indicates that the adjournment was a procedural ruse in an unprecedented situation, and that there was no intention that the Parliament should ever meet again.⁶ It was finally dissolved on 28 April 1707, with a proclamation issued the next day, and the Union with England took place on 1 May 1707.⁷

The Queen appointed as her first Professor of Public Law and the Law of Nature and Nations Charles Erskine (or Areskine as he normally spelled it), then one of

1 National Archives of Scotland (henceforth NAS), Records of the Privy Seal (henceforth PS) 3/6, 360-361.

2 See A Grant, *The Story of the University of Edinburgh During its First Three Hundred Years* (1884) vol 1, 229-231; R H Story, *William Carstares: A Character and Career of the Revolutionary Epoch (1649-1715)* (1874) 213-215; A I Dunlop, *William Carstares and the Kirk by Law Established* (1967) 82-83.

3 See K Bowie, *Scottish Public Opinion and the Anglo-Scottish Union* (2007) 92-169.

4 See now C A Whatley with D J Patrick, *The Scots and the Union* (2006) 274-315; M Fry, *The Union: England, Scotland and the Treaty of 1707* (2006) 259-290.

5 T Thomson and C Innes (eds), *Acts of the Parliaments of Scotland (1814-1875)* (henceforth APS) vol 11, 404-406.

6 APS vol 11, 491.

7 H Maule to Earl of Mar, 29 Apr 1707, in Historical Manuscripts Commission (henceforth HMC), *Report on the Manuscripts of the Earl of Mar and Kellie Preserved at Alloa House*, NB (1904) 389; APS vol 11, 406.

the regents in philosophy in Edinburgh.⁸ Areskine (1680-1763) was the fourth son of Sir Charles Areskine, 1st Baronet, of Alva (1643-1690) and his wife, Christian Dundas, daughter of Sir James Dundas of Arniston. The Areskines of Alva were a cadet branch of the family of the Earls of Mar, Sir Charles being the grandson of John, Earl of Mar, and his second wife Mary, daughter of the Duke of Lennox.⁹

Charles Areskine was therefore from a privileged background among the educated land-owning classes of Scotland, who, in the second half of the seventeenth century, had come to dominate the Faculty of Advocates and to monopolise legal offices.¹⁰ Moreover, the Areskines of Alva and the Dundases of Arniston had impeccable credentials as opponents of episcopacy in the Kirk and supporters of the Covenant. Though created a baronet in 1666, Sir Charles Areskine had been active in securing the Revolution, while his eldest son, Sir James Areskine, had been killed at the battle of Landen in 1693, fighting for King William against the French. The Areskines and Dundases also had a history of service in Parliament, while the latter had already developed a tradition of holding legal office. The first professor's brother, Sir John Areskine (1672-1739), the second son and third baronet, had himself become an advocate in 1700.¹¹

B. EARLIER VIEWS ON THE FOUNDING OF THE CHAIR

Charles Areskine's relative, John Erskine, 6th and 11th Earl of Mar, was one of Queen Anne's Scottish Secretaries of State. Mar was close to the Duke of Queensberry, the Queen's Commissioner to the Union Parliament.¹² Having been on the Commission to negotiate the Union, Mar had been energetic in securing, through astute management, the passing of the Act of Union in the Scottish Parliament.¹³ Sir John Areskine of Alva, Charles's brother, was Commissioner in the Parliament for the burgh of Burntisland.¹⁴ Like his cousin, Robert Dundas of Arniston,

8 NAS, PS3/6, 360-361.

9 See J W Cairns, "Erskine, Charles, Lord Tinwald (*bap* 1680, *d* 1763)", in H C G Matthew and B Harrison (eds), *Oxford Dictionary of National Biography* (2004). Aspects of this entry are qualified by what is written here.

10 N T Phillipson, "Lawyers, landowners, and the civic leadership of post-Union Scotland: an essay on the social role of the Faculty of Advocates 1661-1830 in 18th century Scottish society" 1976 JR 97; T I Rae, "The origins of the Advocates' Library", in P Cadell and A Matheson (eds), *For the Encouragement of Learning: Scotland's National Library 1689-1989* (1989) 1 esp at 8 and tables 1-3.

11 J Steuart to J Ogilvie, 11 Aug 1693, in J Grant (ed), *Seafield Correspondence from 1685 to 1708* (Scottish History Society, Second Series 3, 1912) 115; M D Young (ed), *The Parliaments of Scotland: Burgh and Shire Commissioners* (1992-1993) vol 1, 227-229; D W Hayton, "Erskine (Areskine) Sir John, 3rd Bt (1672-1739)", in E Cruickshanks, S Handley and D W Hayton (eds), *The History of Parliament. The House of Commons, 1690-1715* (2002) vol 3, 983-986.

12 Whatley with Patrick, *The Scots and the Union* (n 4) 33.

13 On his management skills, see W Ferguson, *Scotland's Relations with England: A Survey to 1707* (1977) 267.

14 Young, *Parliaments of Scotland* (n 11) vol 1, 228-229.

and brother-in-law, John Haldane of Gleneagles, Sir John – having once been a committed and vocal opponent of the Court – was now a member of the New Party or Squadrone Volante, the members of which were crucial in securing the Union for the Court, by swinging their votes, hitherto generally cast in opposition, behind it.¹⁵ This background makes it tempting to see the creation of the chair as a political “job”, a reward for a kinsman of the Earl of Mar, and brother of Sir John Areskine. Earlier scholars have indeed followed such a line, though sometimes confused about the identification of Areskine and his patrons.

In *The History of the University of Edinburgh*, Alexander Bower commented that the creation of the chair “appears to have been occasioned in a great measure by Mr Areskine’s interest at court, in consequence of the active part which his connexions had taken in regard to the accomplishment of the union of the two kingdoms”.¹⁶ Pointing to the Earl of Ilay’s later patronage of Areskine, he suggested that his appointment to the chair was due to the Earl’s influence, who was then Lord High Treasurer of Scotland.¹⁷ Bower also suggested that the professorship was established as a regius appointment in order to help the government to manage the Faculty of Advocates who were – he considered – strongly Jacobite, “as none but a member of the faculty of advocates is competent to receive that appointment”.¹⁸ He mistakenly thought that Areskine had been admitted to the Faculty in 1704, confusing him with Charles Erskine, a son of Lord Cardross, the heir to the Earldom of Buchan.¹⁹

Andrew Dalzel expressed similar views in his posthumously published *History of the University of Edinburgh*. He described the conversion of the bursaries of theology into an endowment to support this chair as “a scandalous job, which ought not to have been consented to by her Majesty’s ministers”.²⁰ Reinforcing this view, he added that “Mr. Erskine was no doubt a man of ability; but instead of doing the duty of his new office ... he took this opportunity to make the tour of Europe”.²¹

Two alternative views were put forward by Sir Alexander Grant in the history published in 1884 to mark the University’s tercentenary. Grant took into account

15 Whatley with Patrick, *The Scots and the Union* (n 4) 250; Young, *Parliaments of Scotland* (n 11) vol 1, 215, 306.

16 A Bower, *The History of the University of Edinburgh; Chiefly Compiled From Original Papers and Records, Never Before Published* (1817) vol 2, 65-66.

17 Bower, *History* vol 2, 67.

18 Bower, *History* vol 2, 67.

19 Bower, *History* vol 2, 66 n°. For this Charles Erskine’s admission, see J M Pinkerton (ed), *The Minute Book of the Faculty of Advocates: volume 1, 1661-1712* (Stair Society vol 29, 1976) 249 (17 June 1704); F J Grant, *The Faculty of Advocates in Scotland, 1532-1943, with Genealogical Notes* (Scottish Record Society, 1944) 66.

20 A Dalzel, *History of the University of Edinburgh from its Foundation: With a Memoir of the Author* (1862) vol 2, 294.

21 Dalzel, *History* vol 2, 295-296.

the innovations and reforms carried out by William Carstares (1649-1715), Principal 1703-1715. Carstares is rightly remembered as a great reforming Principal, whose experiences of education and exile in the Netherlands led him to try to remake the University of Edinburgh on the model of the great Dutch universities.²² Grant accordingly wrote that establishment of the new chair was either “a job, Areskine’s influence at Court enabling him to obtain the diversion of Bursaries in order to create for his benefit a Professorship, which for a long time was of little or no use”, or “it may have been a measure suggested or approved by Carstares for providing a scientific and philosophical basis for a future Faculty of Laws, in imitation, perhaps, of the Dutch Universities”.²³ Grant did not attempt to choose between these possibilities or to develop a more complex, more nuanced account, although he recognised that there may have been demand for instruction in the law of nature and nations.²⁴ He simply stated that “[w]hichever was the case ... its possessor was for most of his time residing abroad, instead of lecturing to a class”.²⁵

Grant stressed that “[g]reat obscurity hangs over the circumstances of this creation and appointment” and that a “certain amount of mystery hangs over the creation of the Chair”.²⁶ A major contribution to such obscurity and mystery is the apparent lack of much surviving correspondence. This is undoubtedly because the main movers in the foundation of the chair were together in Edinburgh for the Parliament, with no need to inform each other of their views in writing.

Bower, Dalzel, and Grant were, of course, all correct in seeing Areskine’s appointment as the result of patronage. Where they erred was in supposing this meant that the creation of the chair was solely to provide a position or income for Areskine. Bower and Grant were also wrong as to the source of the patronage (Dalzel offered no view). The second of these mistakes will be dealt with first.

C. POLITICAL PATRONAGE

It is most improbable that Archibald Campbell, Earl of Ilay, should have had any hand in Areskine’s appointment. While political positions perhaps had a greater fluidity than they later developed, Areskine’s family was strongly associated with the Squadrone, rather than the faction that formed around Ilay and his brother John, Duke of Argyll. It was only later that Areskine was to become Ilay’s man.

22 See, eg, R D Anderson, M Lynch and N Phillipson, *The University of Edinburgh: an Illustrated History* (2003) 60-63.

23 Grant, *Story* (n 2) vol 1, 232-233.

24 Grant, *Story* (n 2) vol 1, 233 n 1; vol 2, 313-314.

25 Grant, *Story* (n 2) vol 1, 233.

26 Grant, *Story* (n 2) vol 2, 313; vol 1, 232.

In fact it was Areskine's relative Mar, one of the two Secretaries of State, who secured his appointment to the new chair. It was he who gained the agreement of the other Secretary of State, the Earl of Loudoun, and the Queen's Commissioner, the Duke of Queensberry.²⁷ This may seem unsurprising, but it is worth noting that in 1707 Mar was not particularly close to his Areskine of Alva relatives. He is unlikely to have helped achieve this appointment simply to oblige them. Neither Sir John nor his brothers were particularly bound to him. For example, one brother, Robert Areskine, who became physician and councillor to Tsar Peter the Great, was obliged to his uncle Dr Alexander Dundas for assistance with the start of his medical career.²⁸ Indeed, the brothers were manifestly closer at this time to their Squadrone relatives the Dundases of Arniston and brother-in-law John Haldane of Gleneagles. It was not until 1710 that Sir John moved from supporting the Duke of Montrose and the Squadrone to supporting Mar.²⁹

Mar, Loudoun, and Queensberry were willing to gain the appointment for Charles Areskine as part of the rewards and sweeteners that helped secure the Squadrone's support for the Union, since Sir John Areskine had proved an energetic and active Commissioner to the Parliament. Sir John was rewarded with membership of the Commission to administer the Equivalent and a seat in the British Parliament.³⁰ On request, Mar also secured for Charles Areskine a specific allocation of the teinds due from particular proprietors, to ensure that he gained his salary as professor, since the Bishops' Rents were allocated for many purposes.³¹ It is unsurprising that, in 1714, Robert Areskine wrote to Mar referring to "[t]he Many favours our Family has received of Your Lordship".³² Loudoun later sought a favour from the brothers, hinting at his role in their advancement.³³

The appointment of Charles Areskine to this lucrative chair was evidently part of the reward of his family for support of the Union, as the erection of the chair and the nomination of Areskine were achieved by Mar during the Parliamentary session that passed the Act of Union. Such exercises of patronage were the normal way to

27 See the Earl of Mar to D Nairne, 1 Feb 1707, NAS, Mar and Kellie Muniments, GD124/15/487/3; D Nairne to Mar, 11 Feb 1707, NAS, Mar and Kellie Muniments, GD124/15/487/14.

28 Thus Dundas was Areskine's cautioner in his contract of indenture of 11 Nov 1692 with the Edinburgh surgeon Hugh Paterson: National Library of Scotland (henceforth NLS) MS 5163, fol 11. Robert Areskine studied in Paris and took the degree of MD at the University of Utrecht in 1700. See *Album studiorum academiae Rheno-Traiectinae MDCXXXVI-MDCCCLXXXVI: accedunt nomina curatorum et professorum per eadem secula* (1886) col 101 (he evidently matriculated in 1700 only in order to take his degree); R W Innes Smith, *English-Speaking Students of Medicine at the University of Leyden* (1932) 80-81.

29 Hayton (n 11) at 984.

30 Hayton (n 11) at 983.

31 C Areskine to Mar, 24 Apr 1707, NAS, Mar and Kellie Muniments, GD124/15/542/1. See NLS, Ch 4349, registered, NAS, PS3/6, 385-387.

32 R Areskine to Mar, 29 Oct 1714, NLS, MS 5163, fols 27-28.

33 Loudoun to J or C Areskine, 31 Oct 1713, NLS, MS 5163, fol 20.

make appointments, and that Areskine's nomination was achieved in this fashion does not mean that the creation of the chair was solely to provide a sinecure for him, or that he was likely to be unqualified for the post. This, the first error, will be returned to later, but it is important to point out here that it is most improbable that Principal Carstares would have passively accepted an unwanted chair or an unsuitable professor.

D. THE ROLE OF WILLIAM CARSTARES

Dalzel stated that the erection of the chair "was resisted by the patrons and the Principal and Professors of the University".³⁴ The patrons of the University, the Town Council, did indeed resist, at least formally. On 21 March 1707, before the Commissioner, Queensberry, and the Lords of the Treasury and Exchequer at Holyroodhouse (who allocated the bursaries on behalf of the Crown), the Town Council's representatives, together with the Professor of Divinity, George Meldrum, protested that the gift of £150 to Areskine should not prejudice the £200 assigned by King William to support twenty bursaries, and took instruments in the hands of the clerk.³⁵

This may simply have been to protect the magistrates from subsequent legal challenge after the admission of the new professor; but the Town Council generally resisted the institution of regius chairs as an interference with its privileges as patron of the University. Thus, the Council always registered a protest at the appointment of any regius professor, and admitted him only on the basis that such admission did not prejudice the magistrates' rights as patrons. The commission of the first regius professor of ecclesiastical history had accordingly been received under protest in 1703.³⁶ All such subsequent commissions unfailingly were.³⁷

There is, however, no evidence that the Principal and Masters – other than the Professor of Divinity – opposed the creation of the chair and wished to preserve the fifteen bursaries in divinity. In fact, the creation of such a chair was very much in line with the Principal's reforming policies for the university.

Carstares' most famous innovation in the university was to engineer the move from the system of regenting to that of professorships.³⁸ This meant that instead of

34 Dalzel, *History* (n 20) vol 2, 294.

35 Exchequer Minute Book, NAS, E5/5, fol 109v (21 Mar 1707); "Protestation of the Magistrates of Edinburgh", in Exchequer Register Warrants NAS, E8/66/D; Edinburgh City Archives (henceforth ECA), Town Council Minutes (henceforth TCM) xxxviii, 775-776 (21 May 1707).

36 See, eg, Grant, *Story* (n 2) vol 2, 306.

37 D B Horn, *A Short History of the University of Edinburgh, 1556-1889* (1967) 72.

38 ECA, TCM, xxxix, 105-108 (16 June 1708); A Morgan (ed), *University of Edinburgh, Charters, Statutes, and Acts of the Town Council and the Senatus, 1583-1858* (1937, with historical introductions by R K Hannay) 164-166. See, eg, Horn, *Short History* (n 37) 40-41.

each regent taking a class through the entire philosophy curriculum for the degree of MA, now, as professors, they were to be confined to chairs with a specific remit. As well as lecturing on the area of their chair, professors could and did give more specialised private classes. The curriculum was reformed, so that two years in classics were now followed by two years of philosophy, seen as a prelude to professional study in divinity, law, or medicine. Carstares' experience of the Netherlands has rightly been seen as the inspiration of these reforms.³⁹

The son of a Presbyterian minister who had been removed from his parish in 1662, Carstares was educated in Edinburgh and Utrecht. In the Netherlands, he came to know William of Orange. Returning to Britain, he was involved in conspiracies against the Stewart regime and acted as an agent for the Dutch government. After arrest in England, he was sent north and tortured on the orders of the Scottish Privy Council in 1684. Returning to the Netherlands, Carstares became a Chaplain to William of Orange and was appointed minister to the Scottish congregation at Leiden. He returned to Britain with William, and as an ecclesiastical statesman exercised very considerable influence in Scottish affairs, even after William's death and his own appointment as Principal.⁴⁰

A committed Presbyterian, Carstares remained closely connected with the Court, which relied on him to manage the Kirk. His importance to the Queen's ministers in this respect is indicated by the request of a correspondent, who was probably Robert Harley, the English Secretary of State, on 7 January 1707, that Carstares procure from the Kirk a declaration in favour of the Union, as the Scots Parliament got close to its final votes on the Union.⁴¹ In 1706, during the discussions in London on the proposed Treaty, he was regularly consulted not only by Mar but also by individuals such as the Earls of Seafield (then Chancellor), Portland, and Leven.⁴² Through 1707, he was in close contact with Sir David Nairne in Whitehall, Mar's under-secretary.⁴³ Daniel Defoe and William Paterson both stressed to Harley in January 1707 Carstares' importance in restraining the wilder members of the Kirk.⁴⁴

39 Anderson, Lynch & Phillipson, *University of Edinburgh* (n 22) 61-62.

40 T Clarke, "Carstares, William (1649-1715)", in H C G Matthew and B Harrison (eds), *Oxford Dictionary of National Biography* (2004); Story, *William Carstares* (n 2); Dunlop, *William Carstares* (n 2). On the circumstances of his torture, see C Jackson, "Judicial torture, the liberties of the subject, and Anglo-Scottish relations, 1660-1690", in T C Smout (ed), *Anglo-Scottish Relations from 1603 to 1900* (2005) 75 at 85-93.

41 R Harley? to W Carstares, 7 Jan 1707, in J McCormick (ed), *State-Papers and Letters Addressed to William Carstares, Confidential Secretary to K William during the Whole of His Reign; Afterwards Principal of the University of Edinburgh ... to Which is Prefixed The Life of Mr Carstares* (1774) 756-759.

42 See McCormick, *State-Papers and Letters* 742-756.

43 See, e.g., D Nairne to W Carstares, 15 Apr 1707, in McCormick, *State-Papers and Letters* 761; D Nairne to W Carstares, 4 Dec 1707, Edinburgh University Library (henceforth EUL) MS Dk.1.1², fol 115.

44 D Defoe to R Harley, 16 Jan 1707, HMC, *Fifteenth Report, Appendix, Part IV. The Manuscripts of His*

At the least, it is inconceivable that Carstares would not have been consulted about the conversion of the bursaries into an endowment to support the new chair. It is difficult to imagine that, had he been strongly opposed to such a development, his wishes would have been ignored. He was far too important to the Queen's ministers for them to displease him in this way. He was certainly happy to see the Bishops' Rents used for new purposes. Later in 1707, Carstares supported the conversion of bursaries in St Andrews to support a regius chair of ecclesiastical history. This was a development that pleased Principal James Hadow of St Mary's College, as the Lords of the Treasury had filled the bursaries with people unknown to the Masters.⁴⁵ Finally, at the end of 1707, Carstares was trying unsuccessfully to get the government to create a chair in history, which would again have been endowed from the Bishops' Rents and under the patronage of the Crown.⁴⁶

In his important study of patronage in the universities at this period, Roger Emerson has stated that Carstares "was an efficient man who seems to have worked well with Lords Seafield and Mar [who] from around 1706 to 1714 ... were the crown officials most involved with university patronage".⁴⁷ It is accordingly plausible speculation that the creation of this chair from these funds was his initiative. He perhaps planned it with Mar who was in Edinburgh to attend Parliament at the relevant period. Indeed, one can see that the need that Anne's ministers had to manoeuvre the Act of Union successfully – and reasonably peacefully – through Parliament gave Carstares the opportunity to exert pressure to gain the funding necessary to start the school of law that he (and others) wished to establish. Reinforcing Carstares' ability to exert pressure on the Queen's ministers was their desire to ensure that the General Assembly in April 1707 was calm. For this they had to rely on Carstares' powers of management along with those of the moderator, John Stirling, Principal of the University of Glasgow. Carstares, Stirling, and others, such as William Wishart, succeeded in delivering a largely untroubled Assembly that ended with an appropriate loyal address to the Queen. Carstares underlined his usefulness to the ministers by remarking to Mar on the peacefulness and unanimity of the Assembly.⁴⁸ His importance to Mar was such

Grace, the Duke of Portland Preserved at Welbeck Abbey Vol IV (1897) 382-383; W Paterson to R Harley, 18 Jan 1707, HMC, *Report on the Manuscripts of His Grace, the Duke of Portland, KG, Preserved at Welbeck Abbey Vol VIII* (1907) 281-282.

45 W Carstares to Mar, 19 Apr 1707, NAS, Mar and Kellie Muniments, GD124/15/532/1; J Hadow to W Carstares, 2 June 1707, EUL, MS Dk.1.1², fol 62.

46 D Nairne to W Carstares, 4 Dec 1707, EUL, MS Dk 1.1², fol 71.

47 R L Emerson, *Professors, Patronage and Politics: The Aberdeen Universities in the Eighteenth Century* (1992) 5.

48 W Carstares to Mar, 19 Apr 1707, NAS, Mar and Kellie Muniments, GD124/15/532/1, where, in reporting that the General Assembly had been peaceful, did not even mention the issue of this chair, though repeating satisfaction at the conversion of bursaries in St Andrews to support a chair of Divinity and Ecclesiastical History. See also Earl of Glasgow to Mar, 21 Apr 1707, in HMC, *Mar and Kellie* 388.

that he was unlikely to be presented with a project for a chair in his University that he did not want.

Areskine was accordingly able to inform Mar that the “Assembly took no manner of notice of [his] gift”. Indeed he reported that those members with whom he discussed it “seemed to be satisfied that the thing could not have stood as it was, so that now there is not the least noise about it”.⁴⁹ Sir John Areskine acknowledged that the Assembly even returned its thanks to his brother “for what [he] procured from Mr Hado”.⁵⁰ All of this reflects Carstares’ authority, and the views expressed to Areskine by members of the Assembly suggest that many would have agreed with Mar’s assessment that converting the bursaries was desirable as now there was a more than adequate supply of ministers, though they may not have accepted the Episcopalian Earl’s opinion that too many bursaries enabled unsuitable men to join the clergy – “and so our Ministers come to be made up of the Scumme of the people”.⁵¹ Carstares’ friend, the English dissenter Edmund Calamy, expressed a view similar to that of Mar – if in gentler language – when he remarked that the Scots “have too many small bursaries in their Colleges, which are temptations to the inhabitants to breed up for the ministry more than they are able to support and provide for”.⁵² A plausible supposition is that Calamy’s opinion was an echo of the Principal’s views, motivations, and attitude to the conversion of these bursaries into a fund to support a chair in law. Carstares was willing to sacrifice unnecessary bursaries in divinity for a greater good.

If Dalzel was correct that the Masters resisted the creation of the new chair, this was not in order to preserve the bursaries in divinity, for which, in any case, they had not originally wanted Edinburgh University’s share of the Bishop’s Rents to be allocated.⁵³ Instead, they now coveted the funds for themselves. Mar thus informed Nairne that “there were applications going to be made to the Queen’s Servants, that most of that fond of the Bursarys in Edinburgh College might be divided amongst the Professors of Philosophy there”. He thought the creation of the chair was, however, a better use of the money.⁵⁴ The wants of the Masters were not forgotten, however. On 17 March 1707 the Masters petitioned Parliament for an increase in their salaries, claiming that these were half of those of the professors in the other universities. Parliament was sympathetic and recommended them to

49 C Areskine to Mar, 24 Apr 1707, NAS, Mar and Kellie Muniments, GD124/15/542/1.

50 J Areskine to C Areskine, 8 May 1707, NLS, MS 5176, fol 9. I have been unable to determine what this is about and the minutes of the General Assembly give no clue: NAS, CH1/1/18/399.

51 Mar to D Nairne, 1 Feb 1707, NAS, Mar and Kellie Muniments, GD124/15/487/3.

52 E Calamy, *An Historical Account of My Own Life, With Some Reflections on the Times I have lived in (1671-1731)* (1829) vol 2, 217.

53 Horn, *Short History* (n 37) 37.

54 Mar to D Nairne, 1 Feb 1707, NAS, Mar and Kellie Muniments, GD124/15/487/3.

the Queen.⁵⁵ Carstares went to London to make the Parliamentary recommendation effectual, seeking Mar's approval and support.⁵⁶ A deal was done, involving the intercession of Robert Harley, the English Secretary of State, who eased and supported Carstares' access to Sidney Godolphin, then First Lord of the Treasury, and the Queen.⁵⁷ On 15 September 1707 Queen Anne duly granted £210 sterling out of the post office revenues in Scotland to augment the professors' salaries.⁵⁸ If the Masters' wish to have their salaries increased was thus satisfied, it raised a measure of jealousy among the professors at Glasgow.⁵⁹

A final consideration suggesting that there may have been no significant opposition to the erection of this chair from the Principal and Masters was that a regius chair decreased the influence of the Town Council as patrons of the University. The structure of the University meant there was always potential for conflict between the Council and the Principal and Masters, which indeed occurred fairly regularly until the Universities (Scotland) Act 1858 completely recast the University's government.⁶⁰ Carstares seems to have enjoyed generally good relations with the magistrates, but it was only a very short time before that there had been a major quarrel between the Masters and the Town Council.⁶¹ To the Principal and Masters, another chair outwith the gift of the Town Council would have been attractive, as lessening the latter's power in the University: we know that only Professor Meldrum regretted the loss of the bursaries of theology.

E. THE NEED FOR A CHAIR IN LAW

By 1707, men could only be admitted as advocates to plead before the Court of Session after being examined by the Faculty of Advocates on civil (that is, Roman) law. It had once been possible to be admitted "extraordinarily" by examination on Scots law; but the Faculty had followed policies that discouraged this, so that the practice had fallen into disuse.⁶² The "trials" for admission had been deliberately

55 APS vol 11, Appendix, 120-121. EUL, MS La.II.63.30 is an earlier draft of the petition.

56 C Areskine to Mar, 27 May 1707, NAS, Mar and Kellie Muniments, GD124/15/542/2.

57 W Carstares to R Harley, 17 July 1707, 2 Sept 1707, in HMC, *Portland, Volume VIII* (n 44) 292, 294-295.

58 NAS, PS3/6, 431-432. The gift mentions the following professors: William Law, Professor of Philosophy, James Gregory, Professor of Mathematics, William Scott, Charles Areskine, Robert Stewart, Professor of Philosophy, Laurence Dundas, Professor of Humanity, and John Goodall, Professor of Hebrew.

59 D Nairne to W Carstares, 9 Oct 1707, EUL, MS Dk.1.1², fol 65; J Stirling to R Harley, 22 Nov 1707, in HMC, *Portland, Volume VIII* (n 44) 298-299.

60 Horn, *Short History* (n 37) 150-159, 170-174.

61 Horn, *Short History* (n 37) 74-75.

62 J W Cairns, "Advocates' hats, Roman law and admission to the Scots Bar, 1580-1812" (1999) 20:2 *Journal of Legal History* 24 at 48.

modelled on those for the award of a degree of doctor of laws in a university.⁶³ By 1707, the aspiring advocate (“intrans”) was first examined privately *viva voce* in Latin on a title of the civil law taken from Justinian’s *Digest*. If successful in this, he had to prepare and print, in Latin, theses and corollaries for public defence, again in Latin, based on a title from the *Corpus iuris civilis*. After this he then had to write a Latin speech on a “*lex*” taken from the title on which he had prepared his theses, and deliver it from the bench wearing a hat.⁶⁴

This emphasis on the importance of examination in civil law was reinforced in Parliament during the enactment of the articles of Union. The nineteenth article had initially merely protected the College of Justice after the Union.⁶⁵ Over two days in early January 1707, however, an amendment was debated to the first clause, providing for the qualifications of the Ordinary Lords of Session. The Court of Session had been adjourned so that the judges could give proper attention to the provisions. The amendment, as finally carried, stated that, to be eligible for appointment to the bench of the Court, it was necessary to have served in the College of Justice as an advocate or Principal Clerk of Session for five years, or for ten years as a Writer to the Signet. There was then added the further proviso that:⁶⁶

[N]o Writer to the Signet be capable to be admitted a Lord of the Session unless he undergoe a private and publick tryall on the Civill Law before the Faculty of Advocats and be found by them qualified for the said office two years before they shall be named to be a Lord of the Session.

From Sir John Clerk of Penicuik, we know that this provision was intended to strengthen the quality of the bench. In the debate, the Dukes of Hamilton and (particularly) Argyll made very cutting remarks about the quality of some recently appointed judges “that were fitter for the plough than the bench”.⁶⁷

Success in the Faculty’s trials required a reasonable measure of education in civil law, which necessitated either laborious private study or attendance at a foreign university, given the general failure of legal education in the Scottish

63 See, e.g., Pinkerton (ed), *Minute Book* (n 19) 121 (3 Jan 1693). See further J W Cairns, “Alfenus Varus and the Faculty of Advocates: Roman visions and the manners that were fit for admission to the bar in the eighteenth century” (2001) 28 *Ius Commune: Zeitschrift für Europäisches Rechtsgeschichte* 203 at 210-211.

64 For a full discussion of the development of this, see Cairns (n 62).

65 APS vol 11, appendix, 203.

66 J Clerk, *History of the Union of Scotland and Scotland: Extracts from his MS “De Imperio Britannico”*, ed and transl by D Duncan (Scottish History Society, Fifth Series vol 6, 1993) 156; APS vol 11, 380-381. For the article as enacted, see APS vol 11, 411.

67 J Clerk to J Clerk, nd, NAS, Clerk of Penicuik Muniments, GD18/3131/1; also quoted in part in Clerk, *History of the Union* (n 66) 156 n 3. On the heated debates, see also [D Defoe], *The History of the Union of Great Britain* (1709), An Abstract of the Proceedings on the Treaty of Union, 164-168 (fourth sequence of pagination by Arabic numerals).

universities by around 1600.⁶⁸ Of course, Scots had been studying law abroad for centuries; by 1700, the universities of choice had become those of the United Provinces of the Netherlands, particularly Leiden and Utrecht.⁶⁹ Adequate preparation was generally thought to require about two years of foreign study.⁷⁰ Study in the northern Netherlands was very expensive, costing about £100 to £120 sterling each year.⁷¹ In 1695, the Faculty of Advocates estimated that around 160,000 merks (or just under £9,000 sterling) left Scotland yearly to support law students in the Netherlands.⁷²

Such costs make it unsurprising that in the 1680s and 1690s there were a number of proposals to found a chair or chairs in law in Edinburgh. These were variously endorsed by the Faculty of Advocates, the Senators of the College of Justice, and Visitations of the University.⁷³ The essential problem was finding the money for an endowment. The Town Council, as patrons of the University, were understandably unwilling to fund a chair wanted by the College of Justice, with which there was a long-continuing dispute over local taxation. The Faculty of Advocates

68 On the failure of legal education in the Scottish universities, see J W Cairns, "Academic feud, blood feud, and William Welwood: legal education in St Andrews, 1560-1611" (1998) 2 *EdinLR* 158 and 255; J W Cairns, "The law, the advocates and the universities in late sixteenth-century Scotland" (1994) 73 *Scottish Historical Review* 171. There was still apparently some teaching in King's College, Aberdeen, but of a slight nature and it did not continue: J W Cairns, "Lawyers, law professors, and localities: the Universities of Aberdeen, 1680-1750" (1995) 46 *Northern Ireland Legal Quarterly* 304 at 309-315.

69 See R Feenstra, "Scottish-Dutch legal relations in the seventeenth and eighteenth centuries", in H de Ridder-Symoens and J M Fletcher (eds), *Academic Relations between the Low Countries and the British Isles, 1450-1700. Proceedings of the First Conference of Belgian, British and Dutch Historians of Universities held in Ghent, September 30-October 2, 1987* (1987) 25 [reprinted in R Feenstra, *Legal Scholarship and Doctrines of Private Law, 13th-18th Centuries* (1996), XVI]; K van Strien and M Ahsmann "Scottish law students in Leiden at the end of the seventeenth century. The correspondence of John Clerk, 1694-1697" (1992) 19 *Lias: Sources and Documents Relating to the Early Modern History of Ideas* 271 and (1993) 20 *Lias: Sources and Documents Relating to the Early Modern History of Ideas* 1; P Nève, "Disputations of Scots students attending universities in the northern Netherlands", in W M Gordon and T D Fergus (eds), *Legal History in the Making: Proceedings of the Ninth British Legal History Conference, Glasgow 1989* (1991) 95; J W Cairns, "'Importing our lawyers from Holland': Netherlands' influences on Scots law and lawyers in the eighteenth century", in G G Simpson (ed), *Scotland and the Low Countries, 1124-1994* (Mackie Monograph 3, 1996) 136. For some general remarks on where Scots studied law over the centuries, see J W Cairns, "Legal study in Utrecht in the late 1740s: the legal education of Sir David Dalrymple, Lord Hailes", in R van den Bergh (ed), *Summa Eloquentia: Essays in Honour of Margaret Hewett* (2002) 30 [= (2002) *Fundamina: A Journal of Legal History*] at 38-40.

70 Van Strien & Ahsmann (n 69) at 283-287.

71 See, e.g., J S Shaw, *The Management of Scottish Society, 1707-1764: Power, Nobles, Lawyers, Edinburgh Agents and English Influences* (1983) 27-28. See also van Strien & Ahsmann (n 69) at 273-276; C D van Strien, "Schotse Studenten in Leiden omstreeks 1700" (1994) 84 *Leids Jaarboekje* 133 at 137-140, 142-144.

72 Pinkerton, *Minute Book* (n 19) 160 (24 Dec 1695) (correcting 106,000 to 160,000 as the multiplication requires).

73 See, e.g., Pinkerton, *Minute Book* (n 19) 65-66 (12 Jan 1684) 159-161 (24 Dec 1695); EUL, MS Dc 1.4², fols 180-181; Bower, *History* (n 16) vol 1, 328-334, 344-346; Cairns, "'Importing our lawyers from Holland'" (n 69) at 146-147.

proved unable to endow the wanted professorship.⁷⁴ This led the Faculty, in 1695, to seek from Parliament an Act that would apply a month's cess (the land tax) to support "two or more professors of the law". The sum raised was to be given to the Faculty's Treasurer to support the proposed chairs.⁷⁵ It is perhaps unsurprising that Parliament did not find attractive this proposed use of the revenue.

The Queen's ministers' need to have the Union enacted peacefully, with opposition from the Kirk controlled and minimised, gave Carstares the opportunity to gain from the government the support needed to endow a chair in law. If only one chair was created (in 1695 the Faculty had hoped for at least two), it nonetheless was a significant step towards the creation of a law school. An astute politician, Carstares will have recognised the possibility presented by the Union to exert leverage to convert the bursaries. Moreover, to ministers anxious about managing a recalcitrant Kirk, reducing the number of bursaries designed to encourage recruitment to that Kirk must have seemed attractive (as we have seen it very definitely did to Mar).

F. THE DISCIPLINE OF THE CHAIR

In 1695, the Faculty of Advocates noted that the necessity of "mantaining there children abroad severall years" was to learn "the civill and canon laws and other laws necessary for ... practice in this Kingdome".⁷⁶ To avoid such need for study abroad, what was necessary were chairs in civil law, so that professors could prepare students in Scotland for the trials for admission as an advocate. Indeed, the Faculty even envisaged that professors might be attracted from abroad (probably meaning the Netherlands) – which in the 1690s had also been the hope of Carstares for professors of divinity and philosophy.⁷⁷ The likely viability of a chair in civil law had been demonstrated by the success of the private teaching of civil law and Scots law that, from 1699, had developed to fill the gap in provision. By 1707, John Cuninghame, an advocate who had refused to take the oaths of allegiance, had managed to monopolise private law teaching, and was successfully teaching civil law.⁷⁸

Yet, the chair that was erected in 1707 was not the one in civil law that was so much wanted, but instead in public law and the law of nature and nations. This might seem puzzling, but at one level is easily explained. In 1698, Parliament had, in

⁷⁴ See the remarks by Pinkerton in *Minute Book* (n 19) xix.

⁷⁵ Pinkerton, *Minute Book* (n 19) 159-161 (24 Dec 1695).

⁷⁶ Pinkerton, *Minute Book* (n 19) 159 (24 Dec 1695).

⁷⁷ Pinkerton, *Minute Book* (n 19) 160 (24 Dec 1695); Calamy, *Historical Account of My Own Life* (n 52) vol 1, 172; Story, *William Carstares* (n 2) 213, 215.

⁷⁸ See J W Cairns, "John Spotswood, Professor of Law: a preliminary sketch", in W M Gordon (ed), *Miscellany Three* (Stair Society vol 39, 1992) 131 at 133-134, 153.

the Act anent the Tunnage, allocated an annual £150 sterling “as the yearly fee and sallary granted to Mr Alexander Cunningham as Professor of the Civil Law nominat and designed to that profession”.⁷⁹ Cunningham was appointed as “professor of the Civil Law in this Kingdome”.⁸⁰ Towards the end of 1697, Cunningham had solicited Carstares’ support in gaining these funds.⁸¹ Cunningham was then tutor to Lord Lorne, the future second Duke of Argyll; he had earlier been tutor to Lord George Douglas, brother of the Duke of Queensberry.⁸² The Act was in force for five years; but the allocation was renewed in 1704 for a further five years.⁸³

The royal warrant of 11 February 1707 nominating Areskine to the new chair accordingly emphasised that his appointment was “But [ie without] prejudice to Mr Alexander Cunningham quho is nominate professor of the civill law by act of Parliament”.⁸⁴ Because Cunningham had powerful patrons and supporters, his Parliamentary appointment as Professor of Civil Law blocked the creation of the new chair in Edinburgh as one in civil law. Indeed, although the new chair was in a different field of law, Charles Areskine seems still to have had some anxiety about his position. On 8 May 1707, Sir John Areskine defiantly wrote to his brother that he might teach his class and “see what Mr Cunningham & all his interest will say to that”.⁸⁵

If the new chair could not be in civil law, the choice of public law and the law of nature and nations as its field or fields reflected contemporary understanding of what was foundational in legal study. Thus, in 1715, Francis Grant stated that preparation for the study of Scots law required, as well as knowledge of Roman law:⁸⁶

That the young Lawyer have digested the general *Foundations*, of the *Feudal Canon* and all *Laws*; For preparing him by *general Principles of Polity*; that direct the Law of

79 APS vol 10 175-176 (c 37).

80 APS vol 10, appendix, 28.

81 A Cunningham to W Carstares, 20 Oct 1697, in McCormick, *State-Papers and Letters* (n 41) 360-361.

82 See J W Cairns, “Alexander Cunningham’s proposed edition of the Digest: an episode in the history of the Dutch elegant school of Roman law” (2001) 69 *Tijdschrift voor rechtsgeschiedenis* 81 and 307 at 98-113.

83 APS vol 11, 203 (c 9).

84 NAS, PS3/6, 361.

85 J Areskine to C Areskine, 8 May 1707, NLS, MS 5176, fol 9. It seems more likely that the reference to “Mr Cunningham” is to Alexander rather than John, because of the terms of the royal sign manual appointing Areskine.

86 [F Grant], *Law, Religion, and Education Considered; In Three Essays: With Respect to the Youth; who study Law: As a principal Profession, or accessory Accomplishment* (1715) Essay I. On Law, 82-83. I accept the argument of Clare Jackson that these essays are by Francis Grant, Lord Cullen, though the authorship is unimportant for present purposes: see C Jackson, “Revolution principles, *ius naturae*, and *ius gentium* in early-Enlightenment Scotland: the contribution of Sir Francis Grant, Lord Cullen (c 1660-1726)”, in T J Hochstrasser and P Schröder (eds), *Early Modern Natural Law Theories: Context and Strategies in the Early Enlightenment* (2003) 107 at 130 n 63.

every Country: as also have a View of the Law of Nations: which concludes us with the *rest of Mankind*: and the *Elements* of a *Gothic Constitution* in particular; that's the *Foot of our's*.

Grant's prose is contorted and, by modern standards, eccentrically punctuated. But his meaning is clear, and the side-note in the volume stated that the "prerequisites" of study of Scots law were knowledge of "the political Principles of all Laws; the Substantials of the Law of Nations; and of the *Gothick Constitution*". In other words, study of public law and the law of nature and nations was a necessary foundation to the study of Scots law. The chair was thus given a discipline that was both international – a chair in Scots law would not have had such a universal appeal – and of value in the training of lawyers.

Further, the title of the chair directly alluded to the terms of the Treaty of Union. The first clause of the eighteenth article of the Union provided that "the Laws concerning Regulation of Trade, Customs, and ... Excises ... be the same in Scotland, from and after the Union as in England". It then stated "that all other Laws, in use within the Kingdom of Scotland do after the Union ... remain in the same force as before ... but alterable by the Parliament of Great Britain". There was then a distinction drawn between those "Laws concerning publick Right, Policy, and Civil Government, and those which concern private Right". Those that concerned "publick Right, Policy and Civil Government [might] be made the same throughout the whole United Kingdom", whereas "no alteration [might] be made in Laws which concern private Right, except for evident utility of the Subjects within Scotland".⁸⁷

The drafter of this article had in mind the categories of Roman law and two texts in particular. Near the beginning of the *Digest*, an extract from Ulpian's *Institutes* (D 1.1.1.2) states: "There are two branches of legal study: public and private law." The standard modern translation continues: "Public law [*publicum ius*] is that which respects the establishment of the Roman commonwealth, private [*privatum ius*] that which respects individuals' interests, some matters being of public others of private interest." The Latin "*publicum ius*" and "*privatum ius*" could as readily be translated "public right" and "private right", as in the Article of Union. "Interest" and "interests" are translations of the Latin "*utilitas*" and "*utilia*". Ulpian added: "Public law [*publicum ius*] covers religious affairs, the priesthood, and offices of state. Private law [*privatum ius*] is tripartite, being derived from principles of *jus naturale*, *jus gentium*, or *jus civile*." In the slightly later title of the *Digest* "On Enactments by Emperors", the following passage occurs, again taken from Ulpian, this time from his work on *Fideicommissa* (D1.4.2): "In determining

⁸⁷ APS vol 11, 410-411 gives the article as finally enacted.

matters anew, there ought to be some clear evident utility [*evidens utilitas*], so as to justify departing from a rule of law which has seemed fair from time immemorial.”⁸⁸ Thus the text (the standard translation is adapted slightly) was to the effect that statutory reforms should only be for the evident utility of the citizenry.

These extracts from the *Digest* were well-known. The allusions to them in the article (proposed by the Scots Union Commissioners) would have been obvious to those Scots on the Commission with a legal training.⁸⁹ They had also generated much legal discussion over the centuries.⁹⁰ Article 18, especially when considered with D 1.1.1.2 and D 1.4.2, thus seems to have been an important part of the inspiration for the new chair on public law and the law of nature and nations.

When first read in Parliament on 22 October 1706, article 18 occasioned great debate. Some members were in favour of the Scots laws being unalterable in the future by the new Parliament, but the proviso that matters of private right should only be altered for “evident utility” assuaged the worries of most. Defoe, however, recorded that “the other part of the Article about the Laws of Publick Right, Policy, and Civil Government, being made the same thro’out the whole United Kingdom ... occasioned long Discourses”.⁹¹ Parliament resumed consideration of the article the next day. Discussion now crystallised around the issue of the Scots laws on trade, customs and excise becoming the same as those of England after the Union. Opponents of the Union saw this as an opportunity to cause problems, arguing that the Scots were being hereby subjected to laws of which they knew nothing. These English laws, it was argued, should be published, so that they could know them.⁹² The debate was not concluded, but when Parliament reassembled on 25 October, current issues of public order occupied its time. The eighteenth article was finally discussed again on 28 October, but “there was very little Discourse”, because of anxiety about public order.⁹³ When voted on in

88 The translations and adaptations of these texts are taken from *The Digest of Justinian. Latin text edited by Theodor Mommsen with the Aid of Paul Krueger. English Translation edited by Alan Watson* (1985).

89 APS vol 11, appendix, 175. The Commissioners with a legal training included the Earls of Seafield and Stair (both of whom had been admitted as advocates), Lord Archibald Campbell (later Earl of Islay) who had studied law in the Netherlands, John Clerk, younger of Penicuik, advocate, Sir David Dalrymple, advocate, Solicitor General, and the following judges: Sir Hugh Dalrymple, Lord President, Adam Cockburn of Ormiston, Lord Justice-Clerk, Sir Robert Dundas of Arniston, Senator, and Robert Stewart of Tillicoultry, Senator. Neither Cockburn nor Dundas had been admitted as advocates, but Dundas had had a legal training. Not all Commissioners attended, and not all every session.

90 See, e.g., M Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Erster Band: Reichspublizistik und Policeywissenschaft, 1600-1800* (1988) 74-79.

91 [Defoe], *History of the Union*, Abstract of the Proceedings (n 67) 14-15 (fourth sequence of pagination using Arabic numbers).

92 Clerk, *History of the Union* (n 66) 101; [Defoe], *History of the Union*, Abstract of the Proceedings (n 67) 15-16 (fourth sequence of pagination using Arabic numbers).

93 [Defoe], *History of the Union*, Abstract of the Proceedings (n 67) 17-21 (fourth sequence of pagination using Arabic numbers).

Parliament on 31 December, though again there was some discussion, the article was approved.⁹⁴

The controversy over article 18 may have ultimately focused on trade, customs and excise, but it drew attention to the issue of public law, and its relationship to private law. Knowledge of the passages of Ulpian underlying the article would also have emphasised the significance of the law of nature (*ius naturale*), the law of nations (*ius gentium*) and the link of private law with utility. Moreover, by 1707, “publick Right, Policy, and Civil Government” were very much topics understood to be within the purview of the law of nature and nations. To the politicians who needed to be persuaded of the case for a chair, it will have seemed appropriate and timely to create the chair as one of public law and the law of nature and nations.

G. THE IDEA OF *IUS PUBLICUM*

For Ulpian, *publicum ius* included the law on religious matters and the priesthood. Of course, in the Articles of Union the term could not be understood as encompassing the Kirk. Mention of the Kirk was excluded from the Articles to avoid opposition from English High Tories; its protection from change was eventually enacted separately. The meaning of public right in the eighteenth article was accordingly entirely secular.⁹⁵ The idea of public law (to use the term anachronistically) had undergone considerable development through the middle ages and early modern period, and the article has to be interpreted in the way *publicum ius* was understood by about 1700.

In the medieval period, learned discussion of public authority had revolved around the issues of *imperium*, *iurisdictio*, and legislative authority. Particular subjects of debate were the *lex regia* of D 1.4.1pr and the definition of *imperium* in D 2.1.3, both texts of Ulpian.⁹⁶ The first, from his *Institutes*, states: “A decision given by the emperor has the force of a statute. This is because the populace commits to him and into him its own entire authority (*imperium*) and power (*potestas*), doing this by the *lex regia* which is passed anent his authority.” The second, drawn from Ulpian’s treatise *On the Duties of the Quaestor*, is as follows:

94 [Defoe], *History of the Union*, Abstract of the Proceedings (n 67) 161-163 (fourth sequence of pagination using Arabic numbers).

95 Stair to W Carstares, 26 Apr 1706, in McCormick, *State-Papers and Letters* (n 41) 750-751. The sensitive issue of protection of the Church of Scotland after the Union was dealt with by the Act for Securing the Protestant Religion and Presbyterian Church Government, APS vol 11, 402-403 (c 6), the terms of which were inserted into the final version of the Union. See C Kidd, “Religious realignment between the Restoration and Union”, in J Robertson (ed), *A Union for Empire: Political Thought and the British Union of 1707* (1995) 145 at 165-168; Dunlop, *William Carstares* (n 2) 111-118.

96 The following translations are from the Watson edition.

Imperium is simple or mixed. To have simple *imperium* is to have the power of the sword to punish the wicked and this is also called *potestas*. *Imperium* is mixed where it also carries jurisdiction to grant *bonorum possessio*. Such jurisdiction includes also the power to appoint a judge.

Discussion also had to take into account D 1.3.31, also of Ulpian, from his work on the *Lex Julia et Papia*, which states that “The emperor is not bound by statutes”, while the *lex digna vox* of Justinian’s *Codex* stated that the prince ought to profess himself bound by the law.⁹⁷ Though the *lex regia* suggested a popular source for imperial authority, some texts of the *Codex* emphasised a divine origin.⁹⁸

Such contrasting texts engendered a rich and varied literature. Thus, one group of Glossators, focusing on the *lex regia*, argued that the people had irrevocably given their power up to the Emperor, while another group argued that the people still had a right to take it back in certain circumstances.⁹⁹ To make sense of this, the Commentator Bartolus developed a hierarchical view of sovereignty based around the notions of *iurisdictio* and *imperium*.¹⁰⁰ The need to relate these texts to the political realities of the medieval period led his pupil Baldus to argue that the Pope and Emperor had universal sovereignty, which coexisted with the territorial sovereignty of city-states and kingdoms.¹⁰¹ Baldus thought that under the *lex regia* power had been irrevocably resigned to the Emperor.¹⁰²

Any theory of *publicum ius* developed through interpretation of the Roman texts was inevitably limited, however, even when enriched with feudal, Aristotelian and Christian thinking. Further, the political developments of the sixteenth century demonstrated the insufficiency of this approach, while humanist study explored the historical, as distinct from analytical, possibilities of these texts. This encouraged the more universal historical approach to understanding public authority associated with Jean Bodin. Bodin argued that to create a universal legal science it was necessary to engage in comparative study. This led him to a study of different states, which necessitated development of a general understanding

97 C 1.14.4.

98 C 1.17.1; 1.17.2, 18.

99 See H Morel, “La place de la *lex regia* dans l’histoire des idées politiques”, in *Études offertes à Jean Macqueron* (1970) 545 at 546, found quoted in T Veen, “Interpretations of Inst. 1.2.6, D. 1.4.1 and D. 1.3.31: Huber’s historical, juridical and political-theoretical reflections on the *Lex Regia*” (1985) 53 *Tijdschrift voor Rechtsgeschiedenis* 357 at 374; B Tierney, “‘The Prince is not bound by the Laws.’ Accursius and the origins of the modern state” (1963) 5 *Comparative Studies in Society and History* 378.

100 See D Johnston, “The general influence of Roman institutions of state and public law”, in D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (1997) 87 at 97-99.

101 J Canning, *The Political Thought of Baldus de Ubaldis* (1987) 17-70.

102 Canning, *Political Thought of Baldus* 55-64. For examples of the impact of Roman public law, see, e.g., W Ullmann, “Roman public law and medieval monarchy: Norman rulership in Sicily” (1978) *Acta Juridica* 157; K Bezemer, “The Law School of Orleans as school of public administration” (1998) 66 *Tijdschrift voor Rechtsgeschiedenis* 247.

of sovereignty, which he argued was indivisible.¹⁰³ He identified the civil law as the command of the sovereign who was above the law, but he did consider the authority of the sovereign to be constrained by the laws of nature.¹⁰⁴

Bodin's universal approach to understanding sovereignty helped identify the state as the object of political study.¹⁰⁵ It also potentially liberated study of *publicum ius* from exclusive study of Roman public law based on the texts of the *Corpus iuris civilis*. Thus, a *ius publicum Romano-Germanicum* developed through the seventeenth century, as theorists sought to understand the Empire and its constitution.¹⁰⁶ A crucial figure here was Hermann Conring of the University of Helmstedt.¹⁰⁷ These innovations exerted influence in the United Provinces, where, for example, Philippus Vitriarius, a German-born professor at Leiden, published *Institutiones juris publici Romano-Germanici* in 1686.¹⁰⁸ Teaching of *ius publicum* became officially part of the duties of some Dutch professors at this time. Thus, when Gerard Noodt was called from Utrecht to Leiden in 1686, he was appointed to a *professio juris civilis privati et publici* (his salary for the latter was just under a fifth of that for *ius civile privatum*).¹⁰⁹ Others had already been teaching *ius publicum* at Leiden.¹¹⁰

Ulrik Huber, professor at the University of Franeker in Friesland, was the most important Dutch theorist in the field. In 1670, he had added to his duties the teaching of *ius publicum*. Huber elaborated a *ius publicum universale*, a juridical science distinguished from politics, on the basis of his view of natural law, particularly in his *De jure civitatis libri tres, novam juris publici universalis disciplinam continens*, first published in 1672, with a definitive edition in 1694.¹¹¹ Strongly

103 See, e.g., J H Franklin, "Sovereignty and the mixed constitution: Bodin and his critics", in J H Burns (ed), *The Cambridge History of Political Thought, 1450-1700* (1991) 298 at 299-302; Johnston (n 100) at 99-100.

104 Q Skinner, *The Foundations of Modern Political Thought. Volume Two: The Age of Reformation* (1978) 284-301.

105 Skinner, *Age of Reformation* 349-358.

106 See, eg, Stolleis, *Geschichte des öffentlichen Rechts* (n 90) 126-224; P Schröder, "The Constitution of the Holy Roman Empire after 1648: Pufendorf's assessment in his Monzambano" (1999) 42 *The Historical Journal* 961 at 962-963.

107 Stolleis, *Geschichte des öffentlichen Rechts* (n 90) 207-210, 231-233.

108 Stolleis, *Geschichte des öffentlichen Rechts* (n 90) 250-251. On the history of the printing of this work, see M Ahsmann and R Feenstra, *Bibliografie van Hoogleraaren in de Rechten aan de Leidse Universiteit tot 1800* (1984) 320-327.

109 G C J J van den Bergh, *The Life and Work of Gerard Noodt (1647-1725): Dutch Legal Scholarship between Humanism and Enlightenment* (1988) 63.

110 Van den Bergh, *Gerard Noodt* 271.

111 T J Veen, *Recht en Nut: Studiën over en naar aanleiding van Ulrik Huber, 1636-1694* (1976) 88-99, 339-349; G C J J van den Bergh, *Die holländische elegante Schule: eine Beitrag zur Geschichte von Humanismus und Rechtswissenschaft in den Niederlanden, 1500-1800* (2002) 184-185; Veen (n 99); Stolleis, *Geschichte des öffentlichen Rechts* (n 90) 291-293; R Feenstra, *Bibliografie van Hoogleraaren in de Rechten aan de Franeker Universiteit tot 1800* (2003) 53-57.

influenced by Calvinist theology, Huber argued that government was necessary for the punishment of sin. The only way this could be achieved was through agreement to establish a *civitas* governed by a sovereign power, that is one with *summum imperium*.¹¹²

Some Dutch professors continued to interpret the teaching of *ius publicum* as the traditional humanistic enterprise of examining Roman law and history, though taking into account natural law. Most notable in this respect was Noodt.¹¹³ The political circumstances of the United Provinces, each in theory sovereign, with the States-General, and the changing role of the Prince of Orange, made public law of great interest to Dutch scholars, even to those who still focused on it in a humanistic way. The overthrow of James VII and II also stimulated their reflections on the foundations of political authority. Thus, the classicist Jacob Perizonius and Huber engaged in a polemic over the *lex regia* in 1689: at issue was the nature of the authority given by the people to the ruler.¹¹⁴ As Rector of the University of Leiden in 1699, Noodt gave an address *De jure summi imperii et lege regia*, in which he founded sovereignty in an individualistic understanding of natural law, whereby from a state of nature the people gave up power to the prince by a social contract.¹¹⁵

Huber and others were thus able to develop the new discipline of *ius publicum universale* by drawing on the tradition of natural law.¹¹⁶ This was because theorists of natural law had sought to provide a rational explanation of the origin of government and a justification of its existence. This typically involved some version of the theory of a social contract. Natural lawyers also explored the extent of a government's authority. This necessarily raised questions about the extent the liberty of the governed could properly be restricted by government, and to what extent they had retained natural liberty, and what natural rights they had surrendered to the magistrate or prince. The work of Thomas Hobbes presented a particular challenge in this respect. Had all natural rights been surrendered to the prince? Did a right to resist the prince remain, if the contract between magistrate and people was breached? Natural lawyers thus explained how human laws came into existence and ought to be obeyed. Notable problems were the relationship of natural law to revealed religion, and whether the obligatory force of natural law

112 I am drawing on the analysis of J Moore and M Siverthorne, "Protestant theologies, limited sovereignties: natural law and conditions of union in the German Empire, the Netherlands and Great Britain", in J Robertson (ed), *A Union for Empire: Political Thought and the British Union of 1707* (1995) 171 at 184-189.

113 Van den Bergh, *Gerard Noodt* (n 109) 166-173, 331.

114 Veen (n 99) at 359-361.

115 Van den Bergh, *Gerard Noodt* (n 109) 191-206.

116 For an overview, see Stolleis, *Geschichte des öffentlichen Rechts* (n 90) 268-297.

lay simply in God's will or elsewhere.¹¹⁷ By 1707, especially in the Protestant lands of northern Europe, this had become a rich, complex, and varied body of thought central to a variety of moral disciplines, as scholars assimilated the intellectual legacy of Hugo Grotius, Hobbes, and Samuel Pufendorf.¹¹⁸ All of this scholarship gave a foundation for a discussion of the new *ius publicum*, and indeed guidance on relations between states, including issues of private international law.¹¹⁹

H. IUS PUBLICUM IN SCOTLAND

The clause in the royal warrant that required Areskine not to prejudice Cunningham's privilege necessarily implied that, in teaching public law, he was not to teach Roman public law, but something akin to Huber's *ius publicum universale*. Whether this was the intention of the clause is uncertain, but Huber's synthesis of contemporary political theory into a *ius publicum universale* was certainly known and influential in Scotland, where his Calvinist approach must have seemed attractive. Indeed, Grant argued that Huber's book *De jure civitatis* contained the "marrow" of the writings of Bodin, Henning Arnisaeus, Grotius and Pufendorf. He further described Huber as "one of the greatest Authors of our Age", and considered that in his work *De jure civitatis* "you have the speculative and practical Lawyer; the Divine and States-man; the Historian and Judge, &c. conjoined in one". With Grotius and Pufendorf, he was one who had "penetrate most of all, as to what's fit for the *Harmony of the World's Societies*".¹²⁰

These new developments in political theorising led Scottish individuals and institutions, in the second half of the seventeenth century, to form collections of public law and the law of nature and nations. They thus acquired works of Grotius, Pufendorf, Richard Cumberland and others, as well as commentaries on them, and books on *ius publicum Romano-Germanicum* and *ius publicum universale*, such as those of Huber, Conring, and Benedikt Carpzov.¹²¹ Among the long list

117 See, eg, K Haakonssen, *Natural Law and Moral Philosophy: from Grotius to the Scottish Enlightenment* (1996) 5-6; T J Hochstrasser, *Natural Law Theories in the Early Enlightenment* (2000) 2-3.

118 See, e.g., M Scattola, "Models in history of natural law" (2001) 28 *Ius Commune: Zeitschrift für Europäisches Rechtsgeschichte* 91, also published in reduced form as M Scattola, "Before and after natural law: models of natural law in ancient and modern times", in T J Hochstrasser and P Schröder (eds), *Early Modern Natural Law Theories: Contexts and Strategies in the Early Enlightenment* (2003) 1.

119 If Huber has become undeservedly obscure, he is still remembered as a scholar of private international law, particularly for his doctrine of comity. See, e.g., A Watson, *Joseph Story and the Comity of Errors: a Case Study in Conflict of Laws* (1992) 1-17.

120 [Grant], *Law, Religion, and Education*, Essay I. On Law (n 86) 83 and 141. See the discussion in Jackson (n 86) at 121.

121 M Townley, *The Best and Finest Lawers and Other Raire Bookes: a Facsimile of the Earliest List of Books in the Advocates' Library, Edinburgh, With an Introduction and Modern Catalogue* (1990) 40-41, 58, 64, 98; *Catalogus librorum bibliothecae juris utriusque, tam civilis quam canonici, publici*

of works the Advocates wished to acquire for their Library in 1695, we can note, as well as the 1693 edition of Grotius, *De jure belli ac pacis* with the commentary of van der Meulen, and the textbook *Institutiones juris naturae et gentium in usum Christiani Ludovici marchionis Brandenburgici ad methodum Hugonis Grotii conscriptae* (1692) by the Leiden professor P R Vitriarius, and other works of natural law, John Locke's *Two Treatises of Government* (1694).¹²² It is worth noting that whoever drew up this list knew that this treatise, published anonymously, was by Locke.¹²³ The Advocates also sought various important works by Conring, Christoph Besold, and Hippolithus à Lapide on the Holy Roman Empire and public law.¹²⁴

Grant's opinion that, before studying Scots law, students should have studied, as well as Roman law, the laws of nature and nations reflected the practice of many Scots students in the Netherlands. By 1700 it was typical for them to attend a class on natural law.¹²⁵ It was indeed one of the "other laws necessary for ... practice in this Kingdom", to which the Advocates referred in 1695.¹²⁶ Though some Dutch professors already had the specific duty to teach public law, it was not until 1746, when Petrus Wesseling was appointed professor of natural law (as well as *ius publicum Romano-Germanicum*) in Utrecht, that the first chair in the law of nature and nations was created in the Netherlands.¹²⁷ But the development of private classes (*collegia*) by the professors had allowed them to respond to demand for instruction in subjects outwith the traditional curriculum of civil law taught according to

quam privati, feudalis quam municipalis variorum regnorum, cum historicis Graecis & Latinis, literatis & philosophis plerisque celebrioribus; a Facultate Advocatorum in Supremo Senatu Judicium in Scotia, in usum cupidae legum juventutis constructae (1692) 6, 34, 50, 64, 65, 69; C Shepherd, "The inter-relationship between the library and teaching in the seventeenth and eighteenth centuries", in J R Guild and A Law (eds), *Edinburgh University Library, 1580-1980: a Collection of Historical Essays* (1982) 67 at 72-73; W A Kelly, *The Library of Lord George Douglas (ca. 1667/8?-1693?): An Early Donation to the Advocates Library* (1997) 33, 35, 45, 51, 55, 71, 72-73, 78, 111-112, 134; P J M Willems, *Bibliotheca Fletcheriana: Or, The Extraordinary Library of Andrew Fletcher of Saltoun* (1999) 67-68, 100, 181. There is a valuable discussion of the works on *ius publicum* in Lord George Douglas's library in A Wijffels, Review (1999) 67 *Tijdschrift voor Rechtsgeschiedenis* 161 at 163-164.

122 Pinkerton, *Minute Book* (n 19) 141, 142, 144 (26 Jan 1695).

123 Pinkerton states in *Minute Book* (n 19) that he has printed the titles from the 1741 Catalogue of the Advocates' Library rather than the abbreviated titles given in the MS; comparison with FR 1 (the MS minute book), however, shows that the work is there identified as Locke's. On the significance of this, see further J Locke, *Two Treatises of Government*, ed P Laslett (Cambridge Texts in the History of Political Thought, 1988) 3-5.

124 Pinkerton, *Minute Book* (n 19) 145-146 (26 Jan 1695).

125 Van Strien & Ahsmann (n 69) at 300-302.

126 Pinkerton, *Minute Book* (n 19) 159 (24 Dec 1695).

127 R Welten "Utrechtse hoogleraren in de rechten (1636-1815): enkele aspecten van geschiedenis van de rechtsfaculteit te Utrecht" (1987) 55 *Tijdschrift voor Rechtsgeschiedenis* 67 at 98-99; J Roelevink, *Gediceerd verleden: Het onderwijs in de algemene geschiedenis aan de Universiteit te Utrecht, 1735-1839* (1986) 154-166.

the *ordo legum*.¹²⁸ Professors accordingly offered private *collegia* in natural law and public law, even though the latter was sometimes also taught publicly. Dutch classes on natural law were generally taught on the basis either of Grotius' treatise *De jure belli ac pacis* (originally of 1625) or Pufendorf's work *De officio hominis et civis juxta legem naturalem* (first published in 1673), an abridgement for students of his major study *De jure naturae et gentium* of 1672. Some professors produced their own textbooks for *ius publicum* as well as natural law.¹²⁹

In Scotland, from at least the 1690s, natural law was providing a new grounding for the teaching of ethics. Crucial in this was Gershom Carmichael in Glasgow, regent in philosophy from 1694.¹³⁰ Carmichael established the use of Pufendorf's short textbook for this purpose, and published editions for students with supplements and notes.¹³¹ In Edinburgh, William Scott, one of the regents in philosophy from 1695, gave private classes on Grotius probably from the later 1690s.¹³² In 1699, he prepared theses for his students that defended Scotland's Darien colony, using argument from natural law.¹³³ In 1707, he published a teaching-text for Edinburgh students based on Grotius' *De jure belli ac pacis*.¹³⁴ Scott's contemporary, William Law, regent in Edinburgh from 1690 after the purge of

128 M J A M Ahsmann, *Collegium und Kolleg: Der juristische Unterricht an der Universität Leiden 1575-1630 unter besonderer Berücksichtigung der Disputationen*, transl by I Sagel-Grande (2000) 239-323; M J A M Ahsmann, "Collegia Publica et Privata: eine Erscheinung deutscher Herkunft an den niederländischen juristischen Fakultäten um 1600?", in R Feenstra and C Coppens (eds), *Die rechtswissenschaftlichen Beziehungen zwischen den Niederlanden und Deutschland in historischer Sicht* (1991) 1.

129 See generally C J H Jansen, "Over de 18e eeuwse docenten natuurrecht aan Nederlandse universiteiten en de door hen gebruikte leerboeken" (1987) 55 *Tijdschrift voor Rechtsgeschiedenis* 103.

130 See J Moore and M Silverthorne, "Gershom Carmichael and the natural jurisprudence tradition in eighteenth-century Scotland", in I Hont and M Ignatieff (eds), *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (1983) 73; J Moore and M Silverthorne, "Natural sociability and natural rights in the moral philosophy of Gershom Carmichael", in V Hope (ed), *Philosophers of the Scottish Enlightenment* (1984) 1; Moore & Silverthorne (n 112) at 189-197; Haakonssen, *Natural Law and Moral Philosophy* (n 117) 63-99.

131 S[amuelis] Puffendorfii *de officio hominis et civis, juxta legem naturalem, libri duo. Editio nova, aucta observationibus & supplementis, ... adjectis a Gerschomo Carmichael* (1718); S[amuelis] Puffendorfii *de officio hominis et civis, juxta legem naturalem, libri duo. Supplementis et observationibus in academicae juventutis auxit et illustravit Gerschomus Carmichael, Philosophiae in Academia Glasguensi Professor. Editio secunda priore auctior et emendatior* (1724). Carmichael's annotations were included in the Leiden edition published as S Pufendorf, *De officio hominis et civis secundum legem naturalem libri duo* (1769). For an English translation of Carmichael's notes, see G Carmichael, *Natural Rights on the Threshold of the Scottish Enlightenment: the Writings of Gershom Carmichael*, ed J Moore and M Silverthorne (2002).

132 C P Finlayson, "Edinburgh University and the Darien Scheme" (1955) 34 *Scottish Historical Review* 97 at 99-100.

133 D Armitage, "The Scottish vision of empire: intellectual origins of the Darien Venture", in J Robertson (ed), *A Union for Empire: Political Thought and the British Union of 1707* (1995) 97 at 110-111.

134 [W Scott], *Hugonis Grotii de jure belli ac pacis librorum III. compendium, annotationibus & commentariis selectis illustratum. in usum studiosae juventutis academiae Edinensis* (Edinburgh, 1707).

the Episcopalians, and Professor in Moral Philosophy from 1708 to 1728, was described as teaching “a College on *Grot. De Verit. Rel. Christ. and Puff. De Off. Hom et Civ. &c*” on the foundations of religion that was “[e]qually fitted, for whatever Station; the Student designs or may obtain, in the World: Especially the Great-Man, or Lawyer, &c.”¹³⁵

Such ethics based on natural law provided Scots lawyers with a foundation for an understanding, rationalisation and critique of their law. Natural law explained how human laws came into existence and why they ought to be obeyed. In particular, it stimulated and provided the materials for debates over the origins of obligations and property. One obvious result of such theorising about natural law was the publication of *The Institutions of the Law of Scotland: Deduced from its Originals, and Collated with the Civil, Canon and Feudal Laws, and with the Customs of Neighbouring Nations*, written by James Dalrymple, Viscount Stair. Substantially completed by 1662, this work was first printed in 1681, with a second, and rather different, edition in 1693.¹³⁶ It located Scots law within the framework of the law of nature and nations. Further, argument from the law of nature and nations was accepted at this period in the written pleadings used in the Court of Session and High Court of Justiciary.¹³⁷

This means that, if a chair of civil law could not be established, one devoted to public law and the law of nature and nations certainly reflected current interests in Scotland in legal education and ethics. Further, that *ius publicum* was mentioned as a separate – if linked – discipline to natural law indicates a desire to differentiate the study of the law of nature and nations from that of the proper ordering of government. Public law in the title of the chair thus meant something more than just the matters of trade and taxation – important though they were – that were focused on in the discussion in Parliament of article 18 of the Union. It alluded to the new discipline of *ius publicum universale* that had developed in the German and Dutch lands through the seventeenth century, notably as synthesised by Huber.

In creating this chair, Carstares and his associates were in line with the most

135 [Grant], *Law, Religion, and Education*, The Design. By the Publisher, to the Reader (n 86) sig. ¶[3] v, note *. On William Law, see R B Sher, “Professors of virtue: the social history of the Edinburgh moral philosophy chair in the eighteenth century”, in M A Stewart (ed), *Studies in the Philosophy of the Scottish Enlightenment* (1990) 87 at 92-93.

136 Little has yet been published on the crucial issue of the development of Stair’s text and the relationship between the two editions and the manuscripts: see A Watson, *The Making of the Civil Law* (1981) 31.

137 Although this was to become a more obvious feature of the eighteenth century: see J W Cairns, “Historical Introduction”, in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, 14 at 135-139, 159-168. On the development of written pleadings, see D Parratt, *The Development and Use of Written Pleadings in Scots Civil Procedure* (Stair Society vol 48, 2006).

advanced contemporary developments. The first such chair, though not established in a law faculty, was as recent as 1661, when Pufendorf was appointed to a professorship in Heidelberg that he always described as in natural law, though formally it was in international law (*ius gentium*) and philology. In 1667, Pufendorf moved to the new university of Lund to take up a chair specifically in the law of nature and nations.¹³⁸ Thereafter a few other chairs were created in the field of natural law.¹³⁹ There were never to be many such chairs because of the continued dominance of civil law in the universities, until the era of codification re-oriented legal studies around national legal systems.

In 1707, the intellectual and political significance of this type of thinking is evident. Whatley and Patrick have pointed out the importance in enacting the Union of those who had been exiles in the United Provinces during the Restoration regime, many of whom accompanied William to England in 1688.¹⁴⁰ In little over half a century, Scotland had experienced conquest by the Regicide Oliver Cromwell, the divisions, rebellions and repression of the Restored Stewart multiple monarchy, the deprivation of James VII, and the offer of the throne to William and Mary. For those individuals, such as Carstares, who sailed on William's own ship, natural law offered an intellectual way of understanding and legitimising their own actions.¹⁴¹ Historical scholarship has paid little attention to the potential theoretical and ideological issues underlying the Union of 1707; but natural-law theorising could play a part in explaining the possibility of the political communities of two sovereign polities each agreeing to dissolve to create a new sovereign polity. Of course, the intellectual discourse surrounding the Revolution and the Union was rich and varied.¹⁴² For many, the coming of William will simply have reflected God's providence. But to Carstares, when the possibility of gaining funding for a chair in law appeared, a chair in the law of nature and nations will have seemed to reflect a contemporary need. Study of how government should be conducted on the grounds of utility or public interest must have been made more pressing by the Union, when the public law provision was that private law should only be altered when it was for the evident utility of the Scottish people.

138 See, eg, Hochstrasser, *Natural Law Theories* (n 117) 42 n 4.

139 G Tarello, *Le ideologie della codificazione nel secolo XVIII. Corso di filosofia del diritto*, 3rd edn (1976) 90-91.

140 Whatley with Patrick, *Scots and the Union* (n 4) 30, 78-81. On the exiles, see G Gardner, *The Scottish Exile Community in the Netherlands, 1660-1690* (2004).

141 See, e.g., Jackson (n 86).

142 See, e.g., W Ferguson, "Imperial crowns: a neglected facet of the background to the Treaty of Union of 1707" (1974) 53 *Scottish Historical Review* 22; J Robertson, "An elusive sovereignty: the course of the Union debate in Scotland, 1698-1707", in J Robertson (ed), *A Union for Empire: Political Thought and the British Union of 1707* (1995) 198; K Bowie, "Public opinion, popular politics and the Union of 1707" (2003) 82 *Scottish Historical Review* 226.

Creation of this chair may also have been attractive to politicians. One can speculate that Carstares, in seizing the opportunity to gain funding for a chair, chose such disciplines as seemed likely to be endorsed by politicians managing the Union. Thus, Grotius was certainly relied on in the debates in Parliament on the Union. In a speech on the third article, which provided that the United Kingdom be represented by one Parliament, William Seton of Pitmedden, who had been one of the Scottish Commissioners to negotiate the Union, cited Grotius in support of both the idea of an incorporating union and the proposed Scottish representation in the united Parliament.¹⁴³

I. THE CHOICE OF ARESKINE

Implicit in the argument of the previous sections is the assumption that the chair was not specially created to provide a reward for Areskine. Both Bower and Dalzel assumed the contrary.¹⁴⁴ Sir Alexander Grant admitted this possibility, but since he also suggested that establishment of the chair might have been the product of Carstares' educational policies, he had also to concede that the chair may have been planned before the decision to appoint Areskine was made.¹⁴⁵

Bower observed that "[a]bout the beginning of this year [1707], and previous to the induction of Mr Areskine", William Scott had published his abridgement of Grotius.¹⁴⁶ He drew no further conclusions; but Grant, noting that the abridgement contained the content of lectures Scott had already been dictating to his class, stated that "[i]t is possible that Carstares may have suggested the delivery of these lectures as a first step towards the foundation of a Chair". He then commented that "under the circumstances it is remarkable that the Chair, when founded, should have been given to Areskine and not to Scott".¹⁴⁷ He also described Scott as "failing to obtain the Chair", though having "lectured on the Law of Nature and Nations in 1706".¹⁴⁸ Following this lead, James Lorimer wrote in 1888:¹⁴⁹

The coincidence between the date of the publication of Scott's book and the foundation of the chair, 1707, may be taken, I think, as indicating that Scott was a candidate for it.

143 [Defoe], *History of the Union*, Abstract of the Proceedings (n 67) 78-79 (fourth sequence of pagination using Arabic numbers). Seton cited Grotius, *De jure belli ac pacis libri tres* 2.9.9 and 2.5.22. On the first, see J Robertson, "Andrew Fletcher's vision of Union", in R A Mason (ed) *Scotland and England, 1286-1815* (1987) 203 at 209-211.

144 Bower, *History* (n 16) vol 2, 59-60, 65-66; Dalzel, *History* (n 20) vol 2, 294.

145 Grant, *Story* (n 2) vol 1, 232-233; vol 2, 313-314.

146 Bower, *History* (n 16) vol 2, 65.

147 Grant, *Story* (n 2) vol 1, 233 n 1; see also vol 1, 260.

148 Grant, *Story* (n 2) vol 2, 322.

149 J Lorimer, "The story of the Chair of Public Law in the University of Edinburgh" (1888) 4 LQR 139 at 143.

Its dedication to the Town Council seems to show that it was on their influence that he relied; and their leaning in his favour may have had something to do with the bitterness with which they resented what they regarded as the high-handed action of the Crown in placing Areskine in the University without their consent.

Others have more recently repeated this opinion.¹⁵⁰

There is no direct evidence of when Scott started to teach his private class on the law of nature and nations; nor is there evidence of his having done so on the suggestion of Carstares. His interest in the discipline, however, certainly antedated Carstares' appointment as Principal, and it is probable that his class did so too.¹⁵¹ Scott donated a copy of his compend of Grotius to the University Library on 4 April 1707, suggesting it had been printed after Areskine had received his royal patent.¹⁵² Given the Town Council's opposition to regius chairs, it is most unlikely he was the magistrates' candidate in the fashion Lorimer suggested, though they did gift him £30 (sterling) on 8 September 1707 in recognition of his dedication of the compend to them.¹⁵³

In fact, there is clear evidence that, in 1707, Scott did not wish to be Professor of Public Law and the Law of Nature and Nations. In 1714-1715, Scott, now Professor of Greek, was much concerned with increasing his salary. To achieve this, he sought the patronage of the Duke of Montrose, the Scottish Secretary. His channels to Montrose were Carstares and James Anderson WS, the famous antiquary.¹⁵⁴ Scott and Anderson had even considered Scott's prospect of succeeding John Cumming as Regius Professor of Ecclesiastical History, until they heard that it was likely that the post would go to Carstares' talented nephew, William Dunlop.¹⁵⁵ Carstares had apparently suggested that some income or potential income of his as Principal could be used to benefit Scott.¹⁵⁶ Scott was embarrassed by this proposal. He informed Anderson:¹⁵⁷

If another Gentleman of our Society had made me such an offer I might have been tempted to embrace it, and that you may understand my meaning I must tell you a thing I never communicated to any body. You know what settlement Mr Areskine has in the College as professor of the Law of Nature a salary of 150 lib. per annum upon

150 See Finlayson (n 132) at 100.

151 Finlayson (n 132) at 98-100.

152 EUL, MS Da.1.31, fol 62.

153 See H Armet (ed), *Extracts from the Records of the Burgh of Edinburgh, 1701-1718* (1967) 160.

154 See W Scott to J Anderson, 2 Dec 1714, NLS, Adv MS 29.1.2(iv), fol 178; A du Toit, "Anderson, James (1662-1728)", in H C G Matthew and B Harrison (eds), *Oxford Dictionary of National Biography* (2004).

155 W Scott to J Anderson, 7 Dec 1714, NLS, Adv MS 29.1.2(iv), fol 180; W Carstares to W Dunlop, 13 Jan 1715, found quoted in Story, *William Carstares* (n 2) 361; W Scott to J Anderson, 7 Dec 1714, NLS, Adv MS 29.1.2(iv), fol 180.

156 See W Scott to J Anderson, 2 Dec 1714, NLS, Adv MS 29.1.2(iv), fol 178.

157 W Scott to J Anderson, 7 Dec 1714, NLS, Adv MS 29.1.2(iv), fol 180.

an allocation which one year with another is near 200 lib. This was first projected for him by my self who gave him the first hint and at the same time concerted with him my being made professor of Greek upon the same fund and he was to use his interest with his friends then in Court to get 100 lib to himself and 50 to me but when it came to the push nothing could be had for me but a base-Letter without a salary.

Should Scott be truthful, this means that the chair was initially projected without any decision as to the prospective occupant. It was in fact Scott who informed Areskine about the plan to create the new chair in law.¹⁵⁸ Scott did not want the chair, but instead wanted to be Professor of Greek.

Correspondence in 1707, when Scott was in London, supports this. Thus, on 27 May Areskine wrote to Mar recommending Scott to him.¹⁵⁹ On 31 May, Scott wrote to Areskine informing him that “now my Lord Mar is resolved to pass the Gift”.¹⁶⁰ The matter of the royal gift of a Greek chair to Scott is somewhat obscure. Carstares certainly knew about it by May 1707, but it is probable that Scott and Areskine were acting independently of the Principal in pursuing the grant, as Scott’s letter to Anderson implies. Scott was certainly aware that his actions were open to criticism. He told Areskine that he had tried to organise matters in such a way that the manner in which the gift would be obtained meant that: “I cant [*sic*] see how I should be blamed and indeed tho his Lordship should doe this for me I intend not to use it till I give my Colleagues all reasonable satisfaction”. He added that he also relied on Areskine’s management of their colleagues.¹⁶¹ He assured Carstares that he would be sorry if what he proposed about a chair of Greek would “give the least umbrage to my Colleagues”, and that he would not want it if it meant “endangering the peace and concord of the Society”.¹⁶² As his letter to Anderson indicates, Scott in fact obtained a patent as “her Majesty’s sole Professor of Greek in the University of Edinburgh”, but it did not contain the gift of salary from the Bishops’ Rents that he sought.¹⁶³ He later certainly seemed to blame Areskine for the failure to be granted a salary, although he was a man prone to feelings of grievance.¹⁶⁴ Scott probably thought that a chair in Greek was obtainable because the commissioners who had visited the universities in the 1690s had finally ruled in favour of creating specific chairs of Greek in 1700. Chairs dedicated to the

158 The letter could possibly mean that Scott had originated the idea of the Chair and proposed to Areskine that he should be appointed. This seems unlikely. Scott was not an astute political player: indeed one gets the impression that, despite his efforts, he was excluded from the game.

159 C Areskine to Mar, 27 May 1707, NAS, Mar and Kellie Muniments, GD124/15/542/2.

160 [W Scott] to C Areskine, 31 May 1707, NLS, MS 5176, fol 11.

161 [W Scott] to C Areskine, 31 May 1707, NLS, MS 5176, fol 11.

162 W Scott to W Carstares, 27 May 1707, EUL MS Dk.1.1.², fol 6.

163 [C Drummond], “State of the method of teaching Greek and philosophy in the University of Edinburgh and other universities in Scotland, – 1731” (1829) *New Scots Magazine* 129 at 130.

164 W Scott to J Anderson, 7 Dec 1714, NLS, Adv MS 29.1.2 (iv), fol 180. See n 170 below.

subject had recently been created, alongside the existing offices of regent, in the universities of St Andrews and Glasgow.¹⁶⁵ In 1708, when the system of regenting ended in Edinburgh, Scott did in fact become Professor of Greek, but not under his royal patent, which he did not seek to make effective.¹⁶⁶

Sir John Areskine's desertion of the Squadrone in favour of Mar in 1710 will have encouraged Scott's approach to Montrose through Anderson and Carstares.¹⁶⁷ When Mar was dismissed after the death of Anne in 1714, Montrose briefly became Secretary of State, and the Squadrone started to manage Scottish patronage.¹⁶⁸ This will have given Scott hope that an approach to the Duke might result in something being done for him, perhaps out of the Bishops' Rents, perhaps to the disadvantage of Areskine. Montrose made no promises but was encouraging; Scott, however, was again disappointed.¹⁶⁹ In the 1720s, with twelve children to support, he still sought an allocation of (now) £150 *per annum*.¹⁷⁰

J. ARESKINE'S QUALIFICATIONS

There may have been better candidates than Areskine to hold a chair in public law and the law of nature and nations. But he was a well-qualified man with certain recognised talents. He had studied at the University of St Andrews, where he matriculated from the second class in St Salvator's College, under the regent

165 *Evidence, Oral and Documentary, Taken and Received by the Commissioners Appointed by His Majesty George IV. July 23d, 1826; and Re-Appointed by his Majesty William IV., October 12th, 1830; for Visiting the Universities of Scotland. Volume I. University of Edinburgh* [henceforth *Edinburgh Evidence*] (1837), Appendix, 45-46; M A Stewart, "The origins of the Scottish Greek Chairs", in E M Craik (ed), *Owls to Athens: Essays on Classical Subjects Presented to Sir Kenneth Dover* (1990) 391 at 393-394; R G Cant, *The University of St. Andrews: a Short History*, 3rd edn (1992) 97; J D Mackie, *The University of Glasgow, 1451-1951* (1954) 158.

166 ECA, TCM, xxix, 105-108 (16 June 1708). He did not register his patent in the Privy Seal Records in Edinburgh.

167 Hayton (n 11) at 984.

168 Emerson, *Professors, Patronage and Politics* (n 47) 5.

169 Montrose to W Scott, 30 Dec 1714, EUL, MS La.I.205a.

170 See [R Scott] to W Scott, no date [but probably July 1723], EUL, MS La.II.63.36, which contains a copy of a petition to Lord Townshend, then Secretary of State, that mentions his 12 children. Sir Richard Steele had also been approached. Scott, with his brothers, including James, British Envoy to Berlin, had also approached Duncan Forbes of Culloden, then Lord Advocate. Once they had hoped that the Beer Duties Act, 9 Geo I, c 14 (1722), which provided an income for the chairs of Civil Law, Universal History and Scots Law, would make an allocation for Scott as Professor of Greek. Failing that they relied on an apparent private promise from Townshend of £150 *per annum* from some other source. See R and T Scott, 30 Mar 1723, EUL, MS La.II.63.33; R Scott to W Scott, 13 July 1723, EUL, MS La.II.63.34; J Scott to W Scott, 13 July 1723, EUL, MS La.II.63.35; R Scott to W Scott, no date [but probably July 1723], EUL, MS La.II.63.36. The correspondence suggests that Scott was burdened with a considerable sense of grievance. This probably reflects his personality as much as any actual wrong done him. See, e.g., J Stewart of Goodtrees to W Scott, 29 June 1709, EUL, MS La.II.63.5 on Scott's financial problems. Stewart, then Lord Advocate, was Scott's uncle by marriage and had been involved in administration of his father's estate.

Alexander Scrymgeour, in the session 1694-1695.¹⁷¹ It is possible he had studied elsewhere in 1693-1694, or had been tutored to the level where he could enter the second class. The latter is more likely, as the Presbytery of Stirling, testifying to his good conduct on 8 November 1700, stated that he had been outwith the bounds of the Presbytery only when he had studied at St Andrews.¹⁷² Towards the end of 1696 he paid to take the degree of BA.¹⁷³ The normal practice in St Andrews would then have been for him to take the degree of MA in 1697. This did not happen. Instead of preparing himself to take the degree, he devoted his time to the private study of mathematics.¹⁷⁴ The minutes of the Senatus of St Andrews recorded on 10 June 1699:¹⁷⁵

Mr Alexander Scrymseour represented to the university that Charles Areskine one of his last Classe desired the degree of Master of Arts The university considering that the said Charles had lately given sufficient proof of his fitness to commence Master of Arts in a comparative tryal for a profession of philosophie in St Leonards Colege where he acquit himself to the satisfaction of the whole masters Doe therfore appoint that without further tryal he be graduat on munday next the thirteenth instant.

He in fact graduated on 12 June 1699.¹⁷⁶

As the third surviving son of a minor landed family, Areskine needed a profession to support himself.¹⁷⁷ That of university regent involved neither the expensive foreign study of an advocate nor the sometimes expensive apprenticeship of some other professions. One can speculate that it was also to his taste, given his noted enthusiasm for mathematics. In contrast to earlier, when regents had typically been young men waiting for a parish, in the final quarter of the seventeenth century the office of regent had become attractive to men from landed or wealthy merchant families.¹⁷⁸ As a chosen profession, however, it had limitations, both as to income, and also as to opportunities. Though Scotland had five universities, the vacancies that arose would nonetheless be few around 1700. After the Revolution of 1688-1689, the universities of Edinburgh, St Andrews, and Glasgow had been successfully purged of episcopalians. This meant that there were many men relatively newly in post. The two Aberdeen universities, King's College and

171 St Andrews University Library (henceforth StAUL), Acta Rectorum, 25 Feb 1695, UYUY305/3/497.

172 ECA, McLeod's Collection, bundle 11, shelf 36, bay C.

173 StAUL, Bursar's Book, 2 Dec 1696, UYUY412/173r.

174 See the testimony given in his favour by the Rector, Principal and Masters of St Andrews on 8 November 1700, in which they stated of Areskine that he had "passed his course of philosophie in this universitie, and afterward [had] studied the mathematicks for a considerable time": ECA, McLeod's Collection, bundle 11, shelf 36, bay C.

175 StAUL, Senatus Minutes, 10 June 1699, UYUY452/2/44-45.

176 StAUL, Acta Rectorum, 12 June 1699, UYUY305/3/588.

177 For the bond of provision made by his eldest brother James on 2 April 1690 to provide for his brothers and sisters, including Charles, see NLS, MS 5163, fol 46.

178 Horn, *Short History* (n 37) 32.

Marischal College, had not yet been purged because of the power of the local episcopalian gentry (this was finally to happen in 1716-1717).¹⁷⁹ Areskine's family's covenanting and Presbyterian inheritance would have counted against him in the North East, however, where in any case his family had no interest.

Unsuccessful for the post of regent in St Leonard's, Areskine competed for the post of regent in Edinburgh in November 1700, producing testimonials in favour of his candidacy from the Rector, Principal and Masters of the University of St Andrews and from the Presbytery of Stirling: the first emphasised his academic qualifications and the second his orthodoxy and good conduct.¹⁸⁰ After some delay, perhaps occasioned by the Town Council's desire to avoid having to appoint a Professor of Greek as required by the Commission's report in 1700, he was appointed on 28 February 1701.¹⁸¹

As Areskine's strong focus on mathematics would lead one to anticipate, he was interested in the work of Newton. He taught Newton's theories of light and colour, and, for his graduating class of 1704, prepared theses that dealt with gravity, in which Newton's work was discussed extensively, as well as that of René Descartes – superseded in Areskine's view despite the work of Christian Huygens – and G W Leibniz. The theses ranged over the movements of the celestial bodies such as comets, planets, and the moon, adopting the heliocentric understanding of the universe, and Newton's demonstration that the earth was not a perfect sphere. He cited the Scots mathematician David Gregory, currently Savilian Professor of Astronomy at Oxford. The *corollaria* dealt with the religious implications of the theses, arguing from the observations of gravity to the existence and nature of God, the author of the law of nature.¹⁸²

Insofar as one can judge from the contents of his extensive and varied library, Areskine was a man of wide and serious scholarly interests. He assembled a major collection, some of which survives, split between the Advocates' Library and the National Library of Scotland.¹⁸³ Throughout his life he collected modern works on

179 Emerson, *Professors, Patronage and Politics* (n 47) 18-34.

180 ECA, McLeod's Collection, bundle 11, shelf 36, bay C.

181 *Edinburgh Evidence* (n 165) Appendix, 46-47; Stewart (n 165) at 394-395; Bower, *History* (n 16) vol 2, 4-7.

182 *Theses philosophicae, quas, auspice summo numine, generosi aliquot & ingenui juvenes universitatis Jacobi Regis Edinburgensae alumni, hac vice cum laurea emittendi, eruditorum examini subjicient, ad 12. diem Maii, H. Lq. S. [i.e. Hora Locoque Solitis] praeside Carolo Areskine* (1704). See also C M Shepherd, "Newtonianism in Scottish universities in the seventeenth century", in R H Campbell and A S Skinner (eds), *The Origins and Nature of the Scottish Enlightenment* (1982) 65 at 74; E G Forbes, "Philosophy and science teaching in the seventeenth century", in G Donaldson (ed), *Four Centuries: Edinburgh University Life, 1583-1983* (1983) 28 at 34. Notes survive that were taken by one of Areskine's students, Nicholas Montgomery, of dictates on natural philosophy: EUL, MS Dc.7.98.

183 NLS, MS 3283 contains a catalogue of his library dated 1731 with some subsequent additions. EUL, MS La.III.755 is the press catalogue of his son's library, which largely consists of his. See also NLS, MS

mathematics and natural sciences as well as natural law.¹⁸⁴ He also owned Shaftesbury's *Characteristicks*, a seminal work, which was to have a profound impact on the polite scholars and philosophers of eighteenth-century Scotland.¹⁸⁵

In selecting Areskine for the chair, Carstares and Mar were thus choosing a man of education, intelligence and wide interests, a man who was devout but not an enthusiast in religion, a man who had been excited by the recent developments in the mathematical foundations of natural philosophy or physics that were associated with Newton and the Royal Society. His interest in contemporary physics was such that his graduation theses of 1704 referred to Newton's *Optics*, published earlier that year.¹⁸⁶

Areskine's appointment therefore ought not to be understood as merely a reward for his family. It is true that the salary was large, but it was the same as that awarded by Parliament to Alexander Cunningham as Professor of Civil Law. This was probably the precedent that was followed. Areskine had not studied law, of course, but others who taught the discipline of natural law, such as Gershom Carmichael in Glasgow, also had no formal academic training in law. Nor does it mean that the new chair was conceived of as one in arts: the instruction not to infringe on Cunningham's monopoly indicates that this was the start of the Law School, while Mar referred to it as "a Profession of Law".¹⁸⁷ Areskine was a plausible candidate, well suited for the new chair.

K. ARESKINE'S INITIAL APPOINTMENT

Areskine presented his royal appointment as professor to the Lords of the Treasury at Holyroodhouse on 21 March 1707, to be met with the Town Council's protest.¹⁸⁸

5161, fols 28-30 for a list of books in his son's parlour in Argyle Square. It is almost entirely law books that survive from the Alva Collection both in the Advocates' Library and in the National Library of Scotland. He also owned a set of various MS Practicks, now NLS, Adv MS 22.3.4 (with his bookplate).

184 For works of Newton: NLS, MS 3283, 39, 64, 154; for works of Descartes: NLS, MS 3283, 36, 39, 134; for works of Colin Maclaurin: NLS, MS 3283, 39, 40; for works of Christian Thomasius: NLS, MS 3283, 25, 164; for a sample of works of and about Pufendorf and Grotius: NLS, MS 3283, 22, 23, 24, 32, 42. Other examples could be given. On the importance of Maclaurin as a mathematician and disciple of Newton, see J V Grabiner, "Maclaurin and Newton: the Newtonian style and the authority of mathematics", in C W J Withers and P Wood, *Science and Medicine in the Scottish Enlightenment* (2002) 143.

185 NLS, MS 3283, 63. On the significance of this book, see L E Klein, "The Third Earl of Shaftesbury and the progress of politeness" (1984-1985) 18 *Eighteenth-Century Studies* 186; L E Klein, "Shaftesbury, politeness, and the politics of religion", in N Phillipson and Q Skinner (eds), *Political Discourse in Early Modern Britain* (1993) 283.

186 R L Emerson, "Science and moral philosophy in the Scottish Enlightenment", in M A Stewart (ed), *Studies in the Philosophy of the Scottish Enlightenment* (1990) 11 gives a good discussion of Areskine's intellectual milieu, especially at 18-25.

187 Mar to D Nairne, 1 Feb 1707, NAS, Mar and Kellie Muniments, GD124/15/487/3.

188 Exchequer Minute Book, NAS, E5/5, fol 109v; Protestation of the Magistrates of Edinburgh, NAS E8/66/D; ECA, TCM, xxxviii, 775-776 (21 May 1707).

Nonetheless, his letters patent passed under the Privy Seal in Scotland and were registered on 24 March.¹⁸⁹ To secure his income, he gained by royal warrant, through the intervention of Mar, the allocation of teinds from certain specified properties, which was signed by the Queen on 31 May.¹⁹⁰ This passed under the Privy Seal in Scotland and was registered on 5 July 1707.¹⁹¹ On 17 October 1707, Areskine resigned his office of regent in the College of Edinburgh into the hands of the Town Council as patrons.¹⁹² On 7 November, he presented his commission from the Crown under the Privy Seal and requested that the Town Council admit him to the chair. On the Council's refusal, he protested and took instruments in the hands of the clerk.¹⁹³ Designed as "Professor of the Law of Nature", his first recorded act in his new office was, on 13 November, to donate to the University Library a copy of Aelian with Perizonius' notes published in Leiden in 1701 and to promise to donate a copy of Polybius with Casaubon's notes published by Graevius in Amsterdam in 1670.¹⁹⁴

Dalzel stated of Areskine that, "instead of doing the duty of his new office ... he took this opportunity to make the tour of Europe".¹⁹⁵ Grant wrote that Areskine used "the salary of his Professorship as a means of studying Law at Utrecht, and so qualifying himself for the Scottish Bar", but that nonetheless, despite "immediately obtain[ing] considerable success in his profession, he still appears to have spent much of his time on the Continent". His view was that Areskine "was for most of his time residing abroad, instead of lecturing to a class".¹⁹⁶ This is all rather misleading, matters being both more complicated and rather simpler than these authors suggested.¹⁹⁷

Areskine indeed gained the agreement of Mar and Loudoun that his attendance on the duties of his new chair should be dispensed with for a period. Thus, he reported to Mar, on 24 April 1707, that he had sent the draft of the appropriate letter for royal signature.¹⁹⁸ The Queen duly signed it on 28 April.¹⁹⁹ His brother

189 NAS, PS3/6, 360-361.

190 NLS, Ch 4349.

191 NAS, PS3/6, 385-387. It went through the Exchequer on 21 June 1707: C Areskine to Mar, 22 June 1707, NAS, GD124/15/543/3.

192 ECA, TCM, xxxviii, 853.

193 ECA, TCM, xxxviii, 861-862.

194 EUL, MS Da.1.31, fol 63. The copy of Aelian presented by Areskine is still in EUL, Pressmark *W.23.1-2, the fact of his gift on 13 Nov 1707 inscribed on the title page of each volume. It is possible that Pressmark W.20.18-20 is the copy of Polybius he promised to gift, but there is no mark on the volumes to support this speculation.

195 Dalzel, *History* (n 20) vol 2, 295-296.

196 Grant, *Story* (n 2) vol 1, 233; vol 2, 314.

197 Lorimer (n 149) at 144 follows Grant's account.

198 C Areskine to Mar, 24 Apr 1707, NAS, Mar and Kellie Muniments, GD124/542/1.

199 EUL, MS Dc.6.108.

Sir John wrote to Areskine from London on 8 May reporting that the “licence to travel” had been signed by the Queen.²⁰⁰ It stated:²⁰¹

Whereas we are well informed that the foresaid sallery [*sic*] will not fall due for some space of time, And that the said Mr Charles Areskine is desirous [*sic*] in the mean time, for his further Improvement to go abroad, Therfor [*sic*] we have dispensed with his Attendance upon his Profession aforesaid at our said College for the space of two or three years.

The licence thus alludes to the fact that it is the fund supporting bursaries that has been converted to endow the new chair, which means that some of the income allocated for Areskine’s chair will have had prior calls on it, some of the bursaries at least being occupied. How this related to the later grant of the specific allocation of the teinds from the bishopric of Edinburgh is a matter for further exploration, as its terms suggest that the Lords of the Treasury had the duty to pay Areskine out of any funds from the Bishop’s Rents, should the allocated teinds have a prior call on them.²⁰² Suffice it to say that Areskine could present an arguable case for his permission to go abroad. It would have gained support from the initial recommendation that Alexander Cunningham also be permitted to go abroad after his appointment.²⁰³

It is also important to note that it was not entirely certain whether Areskine would in fact go abroad after appointment to the chair; it was possible that he might have taught. Even after the Queen had signed the licence, his brother advised that “what ever you inclyn to doe I would have you give your self airs as you had an inclination to keep the Class which indeed you may doe if you please”. One anxiety about any teaching by Areskine was the possible reaction of Alexander Cunningham and his patrons.²⁰⁴

L. ARESKINE’S LEGAL EDUCATION

Areskine’s aim was indeed “for his further Improvement to go abroad”.²⁰⁵ His intended “Improvement” was legal study in the Netherlands. In June 1707, he planned to resign his office of regent and leave in August for the Low Countries, travelling by way of London.²⁰⁶ As it turned out, it was at the turn of the year that he left for the Netherlands, where he matriculated in Leiden as a law student on 2

200 J Areskine to C Areskine, 8 May 1707, NLS, MS 5176, fol 9.

201 EUL, MS Dc.6.108.

202 See NLS, Ch 4349.

203 See Cairns (n 82) at 109.

204 J Areskine to C Areskine, 8 May 1707, NLS, MS 5176, fol 9.

205 EUL, MS Dc.6.108.

206 See C Areskine to Mar, 22 June 1707, NAS, Mar and Kellie Muniments, GD124/15/542/3.

February 1708.²⁰⁷ In July 1708, a fellow law student noted that Areskine was going to view the army with Robert Gordon of Cluny.²⁰⁸ That he spent the summer in the Low Countries suggests that he intended to spend at least part of a further year, 1708-1709, in Leiden. This would conform to the regular practice of most Scots law students, who stayed for two years.²⁰⁹

There is little further information about Areskine's studies in Leiden. Neither correspondence nor papers, such as student notes, survive. His arrival early in 1708 will have facilitated attendance at the private *collegia*, which started in February after the Christmas break. At Leiden, Scottish law students commonly attended *collegia* in the *Institutes*, the *Digest*, and natural law.²¹⁰ Areskine will have done so too. It is a fair assumption that he also attended a *collegium* on public law, if available, given the title of his new chair. It is likely he attended other related classes, such as those in history or classical literature. His interests in mathematics and physics may also have influenced such collateral studies as he may have undertaken.²¹¹ He probably studied French (as many Scots did while in the Netherlands) and quite possibly Italian. He certainly owned books in these languages.²¹²

When Areskine was in Leiden, the Faculty of Law comprised Noodt, Vitriarius, Johannes Voet, and Antonius Matthaeus III. Since only Noodt and Vitriarius offered a *Collegium Grotianum* during the period of Areskine's studies at the University, he must have attended the class of one of them, if indeed he formally undertook the discipline.²¹³ There is no way of knowing, however, with whom he studied. The German Vitriarius was the professor in Leiden most popular with the Scots law students at this period.²¹⁴ He used his own textbook *ad methodum Hugonis Grotii* for his *Collegium Grotianum* and his *Institutiones juris publici Romano-Germanici* for his class on public law. Areskine certainly later owned copies of both. His copy of the first could have been acquired in Leiden for his

207 *Album studiosorum Academiae Lugduno Batavae MDLXXV-MDCCCLXXV. Accedunt nomina curatorum et professorum per eadem secula* (1875) col 802. He is described as "Carolus Areskin, Scoto-Britannus", and (wrongly) as aged 24.

208 G Mackenzie to J Mackenzie, 23 July 1708, NLS, Mackenzie of Delvine Papers, MS 1118, fol 69. A trip to visit the army was traditional. Many students would also have relatives serving in Marlborough's armies. See J Taylor, *A Relation of a Voyage to the Army in Several Letters from a Gentleman to his Friend in the Year 1707*, ed C D van Strien (1997) 18-19. Cluny was admitted an advocate early in 1712: Pinkerton, *Minute Book* (n 19) 295 (5 Jan 1712).

209 Van Strien & Ahsmann (n 69) at 281.

210 Van Strien & Ahsmann (n 69) at 294-298.

211 See van Strien & Ahsmann (n 69) at 300-302 on subsidiary or collateral studies. See also C D van Strien, "Schotse Studenten in Leiden Omstreeks 1700 (deel II)" (1996) 86 *Leids Jaarboekje* 127 at 131-133.

212 He owned a considerable number of books in Italian. His library also contained a small number of works in Spanish.

213 See G Mackenzie to J Mackenzie, 4 Mar 1708, NLS, Mackenzie of Delvine Papers, MS 1118, fol 65.

214 See, e.g., van Strien & Ahsmann (n 69) at 290-294, 296-297.

studies.²¹⁵ Noodt's *Collegium Grotianum* (student notes survive contemporary with Areskine's time in Leiden) was a "simple lemmatic explanation" of the author.²¹⁶ Areskine may have attended Noodt's public lectures on "*publici ... juris illustres materias*", with their humanist focus on Roman public law.²¹⁷ Of course men other than the chaired professors offered to teach. Thus, one English law student, who matriculated in 1711, was intriguingly described, not only as attending Vitriarius on Grotius, but also "in an evening sometimes he was desired to hear a Scotch gentleman read upon the Constitution and Government of the United Provinces".²¹⁸

Courses in Roman law will have been central to Areskine's studies. Once again, there is no way of determining with which of the four professors in post he studied. He may even have taken a *collegium* on the *Institutes* with one professor and that on the *Digest* with another, as was not uncommon. He owned works of Voet, Noodt, and Vitriarius, but not of Matthaeus, and it is tempting to suppose that the absence of any works of the last is important in some way, given Areskine's bibliophilia.²¹⁹ Of the other three professors, Vitriarius was of least distinction as a scholar of Roman law, but that did not detract from his popularity as a teacher. Areskine owned a copy of the second edition of Voet's teaching text, *Compendium juris juxta seriem Pandectarum, adjectis differentiis juris civilis et canonici, ut et definitionibus ac divisionibus praecipuis secundum Institutionum titulos* (1688).²²⁰ Whether this is significant is uncertain, given the extensive size of his library, which

215 (1) NLS, MS 3283, 42, 216: Ph R Vitriarius, *Institutiones juris naturae et gentium in usum Christiani Ludovici marchionis Brandenburgici ad methodum Hugonis Grotii conscriptae* (Leiden, 1692); Ahsmann & Feenstra, *Leidse Bibliografie* (n 108) 327 (no 1001). In Areskine's catalogue the date 1704 has been corrected in pencil to 1692 on p 42, and left as 1704 on p 216. It looks as if Areskine originally had a copy of the 1704 edition (Ahsmann & Feenstra, *Leidse Bibliografie* (n 108) 328 (no 1006)), and had subsequently exchanged it for that of 1692 (Ahsmann & Feenstra, *Leidse Bibliografie* (n 108) 327 (no 1001)) sometime after 1731 when the catalogue had first been written. Areskine was a serious book collector and may have had a preference for first editions. The copy of 1692 is now NLS, Pressmark Alva 262. It lacks Areskine's bookplate, and has written on the flyleaf: "Jo: Paterson, Leydan. 93". This suggests that Areskine bought it from another Scot, and the book had probably belonged to John Paterson, a Scot who matriculated as a student of law in 1693 in Leiden: *Album Leiden*, col 726. (2) NLS, MS 3283, 61 (in pencil): *Institutiones juris publici Romano-germanici selectae, antiquum et modernum Imperii Romano-Germanici statum, vera ejus principia, controversias illustres et earum rationes cum affirmantes tum negantes et decedentes, methodo Institutum Justiniani ex ipsis fontibus exhibentes* (1714); Ahsmann & Feenstra, *Leidse Bibliografie* (n 108) 321 (no 991). This copy (presumably) survives in the Alva Collection, NLS, Pressmark Alva 263. This now carries the bookplate, however, of Areskine's son, James Erskine of Alva. This does not mean it was not his father's book at one stage.

216 Van den Bergh, *Gerard Noodt* (n 109) 283; Jansen (n 129) at 106 n 28.

217 Van den Bergh, *Gerard Noodt* (n 109) 270 n 4.

218 See van Strien & Ahsmann (n 69) at 301; C D van Strien, *British Travellers in Holland during the Stuart Period: Edward Browne and John Locke as Tourists in the United Provinces* (1993) 7.

219 NLS, MS 3283, 3, 19, 23, 42, 52, 61, 62, 69. He owned a number of works of Matthaeus' father and grandfather: *ibid* 52.

220 NLS, MS 3283, 59; Ahsmann & Feenstra, *Leidse Bibliografie* (n 108) 337 (no 1044).

contained other teaching compends, such as the famous one of J F Böckelmann in its 1694 edition.²²¹ (Neither of Areskine's copies of these compends appears to survive.) Voet was of the school of the *usus modernus Pandectarum*, with lectures that took account of modern practice.²²² Should Areskine have studied with Noodt, the focus of his class would have been somewhat more antiquarian, as Noodt was more of an elegant scholar in the humanist tradition. His approach was nonetheless generally dogmatic with a lemmatic exposition.²²³ It is easy, however, to over-emphasise the difference between the two approaches.

If there is no way of knowing with whom Areskine studied, his library offers some further tantalising clues that suggest he may have had an interest in the type of elegant historical jurisprudence associated with Noodt. Thus, he owned some important and famous humanist works, such as Guillaume Budé's *De asse* and *Annotationes ad pandectas* (two different editions of the latter), as well as the *Opera* of both Andrea Alciato and Jacques Cujas.²²⁴ He also acquired many modern works in this tradition such as Anton Schultingh's *Dissertationes de recusatione judicis, pro rescriptis de transactione* and *Jurisprudentia vetus ante-Justiniana*.²²⁵ He also owned a number of Noodt's works.²²⁶

221 NLS, MS 3283, 53: *Compendium Institutionum Justiniani sive elementa juris civilis in brevem et facilem ordinem redacta* (1694); Ahsmann & Feenstra, *Leidse Bibliografie* (n 108) 62 (no 34). On Böckelmann and the *methodus compendiaria*, see R Feenstra, "Johan Friedrich Böckelmann (1632-1681): Een markant Leids hoogleraar in de rechten", in S Groenfeld, M E H N Mout, and I Schöffer (eds), *Bestuurders en geleerden, opstellen ... aangeboden aan J J Woltjer* (1985) 137; van den Bergh, *Gerard Noodt* (n 109) 54-55.

222 See R Feenstra and C J D Waal, *Seventeenth-Century Leyden Law Professors and their Influence on the Development of the Civil Law: a Study of Bronchorst, Vinnius and Voet* (1975) 35-44; R Feenstra, "Dictata van Johannes Voet en Gerlach Scheltinga op de Inleidinge van Hugo de Groot (naar aanleiding van twee recente uitgaven)" (1988) 56 *Tijdschrift voor Rechtsgeschiedenis* 93.

223 Van den Bergh, *Gerard Noodt* (n 109) 274-283.

224 NLS, MS 3283, 1, 4, 11. None of these survives in either Alva Collection.

225 NLS, MS 3283, 26. A Schultingh, *Dissertationes de recusatione judicis, pro rescriptis imperatorum Romanorum, de transactione super controversiis quae ex ultimis voluntatibus proficiscuntur, etiam non inspectis vel cognitis illarum verbis recte ineunda. Accedit oratio de jurisprudentia Marci Tullii Ciceronis* (1708); A Schultingh, *Jurisprudentia vetus ante-Justiniana, qua continentur quae supersunt ex Caji institutionum libris IV, Julii Pauli sententiarum receptarum ad filium libri V et fragmentum ex institutionum lib. II, tituli ex corpore Ulpiani XXIX, codicis Gregoriani et Codicis Hermogeniani fragmenta, Mosaicarum et Romanarum legum collatio, consultatio veteris cujusdam jurisconsulti, Papiani responsorum liber, Dositheii magistri liber III, cum commentariis, notis et interpretationibus virorum doctorum integris* (1717). See Ahsmann & Feenstra, *Leidse Bibliografie* (n 108) 222-223 (nos 606 and 612). Neither work is in either Alva Collection.

226 NLS, MS 3283, 23, 153. G Noodt, *Opera varia, quibus continentur probabilius juris civilis libri IV, de jurisdictione et imperio libri II, ad legem Aquiliam liber singularis* (1705); G Noodt, *De foenore et usuris libri tres, in quibus multa juris civilis aliorumque veterum scriptorum loca aut illustrantur aut emendantur* (1698); G Noodt, *Diocletianus et Maximianus sive de transactione et pactione criminum liber singularis* (1704); G Noodt, *De forma emendandi doli mali in contrahendis negotiis admissi apud veteres liber* (1709). See Ahsmann & Feenstra, *Leidse Bibliografie* (n 108) 177-178, 181, 184 (nos 425, 431, 449, 463). Unfortunately, these works do not survive in the Alva collection in the NLS or Advocates' Library.

Areskine had a reasonably large collection of works that could be used to emend the text of the *Digest*, a topic of considerable interest at this time.²²⁷ The very first entry in the catalogue of his library is Torelli's famous edition of the *Digest* in three volumes based on the *Littera Florentina*.²²⁸ Areskine possessed many editions of the *Digest*, also important for variant readings, such as the important Nuremberg edition of 1529 by Gregor Haloander.²²⁹ Also notable is his copy of Agustín's *Emendationes* and treatise *De legibus et senatusconsultis*.²³⁰ He owned two copies of Brenkman's important *Historia pandectarum*, and two of his palingenetic studies.²³¹ He likewise acquired Laurens Gronovius' *Emendationes pandectarum*.²³² He also owned Labitte's *Index* in the Leiden edition of 1674, and a number of other works in this tradition of textual and palingenetic research.²³³

This type of interest reflects the concerns of Noodt (and for that matter Matthaeus III) rather than of Voet or Vitriarius, though the former appreciated the significance of such studies. Given, however, that Areskine also collected many works of the *usus modernus*, works of the *mos Italicus*, as well as a large collection of decisions of Continental courts, what one may see is simply an enthusiastic bibliophile collecting what he knew to be important, valuable, and rare. As yet, though the materials for such a study survive, not enough is known of the collections made by other early-eighteenth-century Scots lawyers to assess how typical or unusual was the collection Areskine built up. This said, in an era when Scots

227 See Cairns (n 82) at 82-83.

228 NLS, MS 3283, 1. His copy is in neither Alva collection.

229 *Digestorum seu Pandectarum libri quinquaginta* (1529). This survives in the NLS, pressmark Alva 354-356. See NLS, MS 3283, 19.

230 A Agustín, *Emendationum et opinionum Libri IIII. Eiusdem ad Modestinum, sive de excusationibus liber singularis. Item, Laelii Taurelli, ad Gallum, et legem Velleam, ad Catonem, et Paulum, de militis ex casu. Omnia quidem secundum Pand. Flo. Editionem* (1560); NLS, Alva, pressmark 265. See NLS, MS 3283, 43. At one time he owned another copy of 1544. He also owned two copies of A Agustín, *De legibus et senatusconsultis liber: Adiunctis legum antiquarum et senatusconsultorum fragmentis, cum notis Fulvij Ursini, multo quam antea emendatius, additis etiam locorum quorundam notis, cum duobus indicibus* (1583 and 1584), Adv Lib, pressmarks Alva 139 and Alva 1. NLS, MS 3283, 43 lists a 1683 edition of this.

231 NLS, MS 3283, 30, 50: H Brenkman, *Historia pandectarum seu fatum exemplaris Florentini. Accedit gemina dissertatio de Analphi* (1722); H Brenkman, *De eurenaticis diatriba sive, in Herenni Modestini librum singulare* (1706); H Brenkman, *Alfenus Varus* (1709). Both copies of the *Historia pandectarum* are still in the Alva collection in the NLS, pressmarks Alva 315, 316. On these works of Brenkman's, with their full titles, see B H Stolte, *Henrik Brenkman (1681-1736): Jurist and Classicist* (1981) 11-14, 23-24, 128-130.

232 NLS, MS 3283, 38, 143: L Th Gronovius, *Emendationes pandectarum juxta Florentinum exemplar examinatae ad virum illustrissimum Antonium Magliabechium* (1685). See T Wallinga, "Laurentius Theodorus Gronovius (1648-1724)" (1997) 65 *Tijdschrift voor Rechtsgeschiedenis* 459; and Stolte, *Henrik Brenkman* (n 231) 18. Areskine's copy does not survive in either Alva collection.

233 NLS, MS 3283, 49, 161, 198: J Labitte, *Index legum omnium quae in pandectis continentur* (1674); and also *Indices juris varii Jac. Labitti, Ant. Augustini et Wolf. Freymonii, ad pandectarum et codicis leges, huc et illuc dispersas, suis authoribus ac libris coniunctim restituendas* (1585).

still viewed law as linked to the classical tradition, when the legacy of the ancient world, both secular and religious, was still the primary concern of scholarship, one may suspect that others had libraries with a similar focus.²³⁴ Further research may also illuminate Areskine's collecting practices. For example, he can be traced buying Otto's *Thesaurus juris romani*, a collection of rare works of humanistic orientation, from a bookseller in the Netherlands as it was published.²³⁵

Areskine's gift and promised further gift to Edinburgh University Library indicate his interest in classics, philology and history. It is fair to assume that he may have copied many of his fellow countrymen in studying history and classics with the distinguished professors to be found in Leiden. He owned a copy of Perizonius' *Commentarii historici*, which may suggest he attended the Leiden professor's classes on modern European history.²³⁶ He may also have attended classes on antiquities and history given by Jacob Gronovius, but this again is speculation. (He owned Gronovius' father's work *De sestertiis* and his edition of Aulus Gellius' *Noctes Atticae*.)²³⁷

M. ARESKINE'S FURTHER TRAVELS

One of Areskine's books of instruction in Italian was published in Amsterdam in 1709.²³⁸ Perhaps he bought it in the Netherlands for study preparatory to his visit to Italy. Precisely when he left for Italy is unknown, but it was obviously in the winter months of 1709-1710.²³⁹ On 8 March 1710, he signed the register of foreign visitors from England and Scotland at the University of Padua.²⁴⁰ He travelled from Venice down the Adriatic coast to Rome. He then went on to Naples, where he stayed a fortnight, before returning again to Rome, where (on 10 May 1710) he planned to remain until the end of June, before returning by way of Berlin, perhaps

234 See Cairns (n 82) at 355-356.

235 T Johnston to C Mackie, 19 Oct 1728, EUL, MS La.II.91.B.62. See NLS, MS 3283, 4. *Thesaurus juris Romani, continens rariora meliorum interpretum opuscula, in quibus jus Romanum emendatur, explicatur, illustratur, itemque classicis aliisque auctoribus haud raro lumen accenditur, cum praefatione Everardi Ottonis* (1725-1729). See M Ahsmann, *Bibliografie van hoogleraren in de rechten aan Utrechtse universiteit tot 1811* (1993) 108 (no 243).

236 NLS, MS 3283, 66. J Perizonius, *Rerum per Europam maxime gestarum ab ineunte saeculo sexto decimo usque ad Caroli V. mortem etc. commentarii historici* (1710). See Th J Meijer, *Kritiek als Hervaaardering: Het Levenswerk van Jacob Perizonius (1651-1715)* (1971) 192-193.

237 J F Gronovius, *De sestertiis seu subsecivorum pecuniae veteris libri IV* (1691); Aulus Gellius, *Noctes Atticae*, ed J F Gronovius (1706). See NLS, MS 3283, 25, 36, 140, 143.

238 NLS, MS 3283, 196.

239 See C Areskine to J Areskine, 10 May 1710, NLS, MS 5072, fol 8v.

240 H F Brown, "Inglese e Scozzesi all' Università di Padova dall' anno 1681 sino al 1765", in *Contributo del R Istituto Veneto di scienze, lettere ed arti alla Celebrazione del VII Centenario della Università di Padova* (1921) 139 at 190 (no 1359).

after visiting Vienna.²⁴¹ By September 1710, he had decided to visit Vienna.²⁴²

He was in London with his brother, Sir John, by the next spring. By now the decision had definitely been made for his admission as an advocate.²⁴³ He returned to Edinburgh in June 1711.²⁴⁴ His trials were expeditious, and he was examined publicly by the Faculty of Advocates on 14 July of that year.²⁴⁵ He dedicated his theses to his family's current patron, Mar.²⁴⁶ He was admitted as an advocate by the Lords of Session on 17 July.²⁴⁷ By mid-November, he was advertising his class on the law of nature and nations in the *Scots Courant*.²⁴⁸

Grant suggests that Areskine spent "most of his time residing abroad instead of lecturing to a class".²⁴⁹ This opinion seems entirely based on combining Areskine's studies in the Netherlands and travel in 1710 with his further visit to the Netherlands in 1716 and 1717. The later visit may initially have been to help with the affairs of his brother Sir John, who had supported his new patron Mar in the Jacobite Rebellion in 1715, and who was in exile until a pardon was quickly secured for him.²⁵⁰ Most certainly it allowed him meet his brother Robert, who was visiting western Europe with the Tsar.²⁵¹ Areskine may himself have become involved in some Jacobite plotting with Robert.²⁵² His stay was certainly protracted and he wrote from Amsterdam to his wife (who was clearly displeased by his lengthy absence) on 25 January 1717 that "you'l [*sic*] begin to think I design to take up my residence in foreign parts, and list myself in the Miscovite [*sic*] service".²⁵³ Despite various promises that he would soon be leaving, he was still in the Netherlands in March of that year.²⁵⁴

241 C Areskine to J Areskine, 10 May 1710, NLS, MS 5072, fol 8.

242 ? Rauner to [C Areskine], 14 Sep 1710, NLS, MS 5072, fol 10.

243 [Christian Dundas, Lady Areskine of Alva] to C Areskine, 8 Mar 1711, in NLS, MS 5176, fol 19.

244 C Areskine to J Areskine, 12 June 1711, NLS, MS 5072, fol 16 [appended to a letter of their brother-in-law, Patrick Campbell of Monzie].

245 Pinkerton, *Minute Book* (n 19) 293 (14 July 1711). He is wrongly designed as son of the "umquhile Sir John Erskin of Alva".

246 C Areskine, *Disputatio juridica, ad tit. 2. lib. 28. ff. de liberis & posthumis haeredibus instituendis* (1711).

247 Grant, *Faculty of Advocates* (n 19) 66.

248 *Scots Courant*, 12/14, 14/16 Nov 1711.

249 Grant, *Story* (n 2) vol 1, 233.

250 Hayton (n 11) at 985.

251 C Areskine to G Grierson, 3 Nov 1716, NLS, MS 5072, fol 94, reporting that his brother Robert is expected. See also his letters of 9 Nov, 17 Nov, 26 Nov, 2 Dec 1716, NLS, MS 5072, fols 98-102, recounting his still waiting for his brother Robert. Robert had finally arrived by 22 Dec 1716: C Areskine to G Grierson, 22 Dec 1716, NLS, MS 5163, fol 36.

252 See J J Murray, "Sweden and the Jacobites in 1716" (1945) 8 *Huntington Library Quarterly* 259 at 265-266; B Lenman, *The Jacobite Risings in Britain 1689-1746* (1980) 185-188.

253 See C Areskine to G Grierson, 25 Jan 1707, NLS, MS 5072, fol 119.

254 C Areskine to G Grierson, 3 Mar 1717, NLS, MS 5072, fol 122. See C Areskine to G Grierson, 5, 15 and 25 Jan, 9 Feb 1717, NLS, MS 5072, fols 116-121.

It is in Italy we get the first references to Areskine's book-collecting, as he informs his brother that he has "bought a good deal of Italian and other books here".²⁵⁵ This raises interesting questions about whether in the Netherlands he had got to know Alexander Cunningham, the prominent Scottish critic and bibliophile, whom we know to have been living in The Hague at the time Areskine was studying in Leiden.²⁵⁶ Pending further study of his library, one can say that many of its items were printed in the Low Countries, and one can speculate were acquired during his studies and his visit to his brother in 1716-1717. Moreover, the Netherlands were the centre of the antiquarian book trade. Areskine evidently continued to acquire books from the Netherlands and in the later 1720s had dealings with the Scottish printer and bookseller at The Hague, Thomas Johnston.²⁵⁷ Such intellectual interests ran in the family. His brother Robert also collected a large library of well over 2,000 titles, as well as a cabinet of minerals, shells, and medals.²⁵⁸ Robert, who had taught and demonstrated anatomy in London, where he was elected to the Fellowship of the Royal Society in 1703, was central to the development of the scientific collections and libraries in St Petersburg under Peter the Great.²⁵⁹ Charles' wife Grizel Grierson also had a collection of books sufficiently large to be worth cataloguing in 1729.²⁶⁰

N. ARESKINE'S TENURE OF THE CHAIR

On 12 November 1711, the *Scots Courant* advertised that:

Mr. Charles Erskine, her Majesty's Professor of the Publick Law, in the University of Edinburgh, designs to begin his private Lecture [*sic*] on the Laws of Nature and Nations; on Friday next at 5 a-clock in the Afternoon, at his Lodgings in Frazers Land.

The advertisement was repeated two days later, altered to indicate that the class

255 C Areskine to J Areskine, 10 May 1710, NLS, MS 5072, fol 8v.

256 Cairns (n 82) at 307-319.

257 T Johnston to C Mackie, 19 Oct 1728, EUL, MS La.II.91.B.62.

258 NLS, MS Acc 8042 contains a transcript of a list of the library. See J H Appleby and A Cunningham, "Robert Erskine and Archibald Pitcairne – two Scottish physicians' outstanding libraries" (1982-1983) 11 *The Bibliothek* 3; J H Appleby and J V Howard, "Theological works from Dr Robert Erskine's library located in the Helsinki University Library's collection" (1982-1983) 11 *The Bibliothek* 101; S Havu and I Lebedeva, *Collections Donated by the Academy of Sciences of St Petersburg to the Alexander University of Finland in 1829: An Annotated Catalogue* (1997) 167-198; V S Kirsanov, "The earliest copy in Russia of Newton's *Principia*: is it David Gregory's copy?" (1992) 46 *Notes and Records of the Royal Society of London* 203; Innes Smith, *English-Speaking Students* (n 28) 80-81.

259 See, e.g., J H Appleby, "Ivan the Terrible to Peter the Great: British formative influence on Russia's medico-apothecary system" (1983) 27 *Medical History* 289 at 299-304; J H Appleby, "Robert Erskine – Scottish Pioneer of Russian natural history" (1982) 10 *Archives of Natural History* 377.

260 See NLS, MS 5161, fols 17-27. This catalogue matches that of Areskine's books in NLS, MS 3283.

started that day.²⁶¹ Areskine obviously intended a course modelled on a Dutch *Collegium Grotianum*. The style of law teaching was not that of a public *praelectio*, but of a private class taught in the professor's home.

There is no other information available on Areskine's teaching. He never advertised again. It is unknown whether he had any students in 1711 to 1712. If not, or if they were few, it may have seemed pointless to attempt to attract a class. Perseverance in teaching may have seemed not worth the effort, especially since it is clear that Areskine very rapidly acquired a good practice in Parliament House, as, for example, William Scott mentioned in 1714.²⁶² In May 1714, he was appointed advocate depute for the western circuit.²⁶³

The prospects of success for his class may have been affected by the politics of the era. Thus, on the very day the Lords admitted Areskine as an advocate, the Faculty of Advocates decided it appropriate to send a loyal address to Queen Anne.²⁶⁴ This was in response to the scandal caused by the gift to the Faculty of a Jacobite medal by the Duchess of Gordon.²⁶⁵ Areskine's cousin, James Dundas, younger of Arniston, took the lead in arguing for acceptance of the medal, which ultimately led to his prosecution for leasing-making in March 1712.²⁶⁶ This probably led to the Dean of Faculty demitting office; it certainly led to the replacement of the Lord Advocate.²⁶⁷ In such a political climate, a discipline that encouraged students to consider the proper authority of government and how that authority should be exercised in law might have seemed too controversial. The Jacobite Rebellion of 1715, in which so many of Areskine's relatives were implicated, his subsequent absence in the Netherlands, his brother Robert's (and perhaps his own) implication in the murky "Gyllenborg plot", all may have forestalled any

261 *Scots Courant* 12/14 and 14/16 Nov 1711. I have not been able to locate Frazer's Land. If Areskine still lived there in 1714, it probably lay in the area around Parliament House on the south side of the High Street running down towards the University's buildings, as Areskine's first child was baptised by Principal Carstares, then minister of the "Old Kirk", on 3 July 1714. By 1715 Areskine and his family had moved to Milne's Square opposite the Tron: see the family details in NLS, MS 5161, fol 7.

262 W Scott to J Anderson, 7 Dec 1714, NLS, Adv MS 29.1.2 (iv), fols 180-181. See also J Ramsay, *Scotland and Scotsmen in the Eighteenth Century*, ed A Allardyce (1888, repr 1996) vol 1, 101.

263 G W T Omond, *The Lord Advocates of Scotland from the Close of the Fifteenth Century to the Passing of the Reform Bill* (1883) vol 2, 1-2.

264 See Pinkerton, *Minute Book* (n 19) 293-294 (17, 18 July 1711).

265 See, e.g., *The Scotch Medal Decipher'd, and the New Hereditary-Right Men Display'd: Or, Remarks on the Late Proceedings of the Faculty of Advocates at Edinburgh, upon Receiving the Pretender's Medal. With an Account of the Laws which make those Proceedings High-Treason* (1711).

266 Books of Adjournal, NAS, JC3/3, 705-736, 741-742, 749. See also NLS, Adv MS 19.3.28, fol 12. Areskine was one of his cousin's counsel.

267 Pinkerton, *Minute Book* (n 19) 295 (1 Jan 1712); Omond, *Lord Advocates* (n 263) vol 1, 291-295; I G Brown, "This Old Magazine of Antiquities": the Advocates' Library as national museum", in P Cadell and A Matheson (eds), *For the Encouragement of Learning: Scotland's National Library 1689-1989* (1989) 149 at 162.

further attempt he might have made to teach, even if he had been so minded.²⁶⁸

Scott complained of Areskine in 1714 that “he teaches none, nor gives the least attendance on the College”.²⁶⁹ If the first was correct, the second was not, at least in the 1720s. Because the College (Senatus) Minutes survive in a continuous register only from 1733, the evidence is fragmentary; it is nonetheless clear. A small number of detached minutes of College Meetings from the 1720s survive. These show that Areskine – at least in that decade – participated to some extent in the collective life of the College. Thus, he appears on the sederunt of meetings on 24 March and 12 April 1726.²⁷⁰ On 25 April 1727 he signed a commission for the College’s representative on the General Assembly.²⁷¹ It was the practice for the professors to take it in turn to attend the students to Lady Yester’s Church. When records survive, Areskine is found participating in this.²⁷² In this decade, each professor took it in turn to deliver a weekly public praelection, from, roughly, late January to early April. A few lists survive between 1722 and 1728, on each of which Areskine is named as participating.²⁷³ Grant stated that “[a] brief inaugural address by him remains, written in Latin, upon God as the fountain of Law”.²⁷⁴ This has not been traced; but it was probably one of these praelections rather than an inaugural lecture in the modern sense. It is worth noting that the fifth *corollarium* in the *Theses philosophicae* he published in 1704 was on a similar theme. There he stated that “the Law of Nature recognizes God as its author”.²⁷⁵ The practice of the professors giving these public praelections must have died out some time shortly after 1728, as on 27 December 1733 the College Meeting decided to revive it.²⁷⁶

This activity suggests a relatively significant commitment to the University, especially given the development of his political career in the 1720s. In 1722, under the joint patronage of the Duke of Queensberry and Marquess of Annandale, he became MP for Dumfriesshire, where he was able to develop a political interest through his marriage in 1713 to Grizel, heiress of John Grierson of

268 On the “Gyllenborg plot”, see Murray (n 252); Lenman, *Jacobite Risings in Britain* (n 252) 185–188. For some of the relevant documentation, see R Paul (ed), “Letters and documents relating to Robert Erskine, physician to Peter the Great Czar of Russia 1677–1720”, in *Miscellany of the Scottish History Society, Vol II* (Scottish History Society 44, 1904) 371 at 419–424.

269 W Scott to J Anderson, 7 Dec 1714, NLS, Adv MS 29.1.2 (iv), fols 180–181; Ramsay, *Scotland and Scotsmen* (n 262) vol 1, 101.

270 EUL, MS Dc.1.4¹/89, 92.

271 EUL, MS Dc.1.4¹/107.

272 EUL, MS Dc.1.4¹/78, 86.

273 EUL, MS Dc.1.4¹/78, 86, 98.

274 Grant, *Story* (n 2) vol 2, 314.

275 C Areskine, *Theses philosophicae* (n 182) 12.

276 EUL, Senate Minutes, i, 7 (27 Dec 1733).

Barjarg.²⁷⁷ Areskine soon moved to the circle of Lord Ilay, so that, when Walpole allied with Ilay and Argyll in 1725, Areskine was brought in as Solicitor General with Duncan Forbes of Culloden as Lord Advocate. He held that office until 1737, when he replaced Forbes as Lord Advocate.²⁷⁸ He had already resigned the chair, in 1734, to be succeeded by his protégé, William Kirkpatrick.²⁷⁹

Areskine may have made no significant contribution to the University as a teacher. But his involvement in its corporate life in the 1720s does suggest a commitment to furthering its success. Some of that involvement, such as in choosing the University's representative to the General Assembly, may well have been in the interest of his political masters, but that cannot be said of all his activities. Further, his closeness to Ilay and political engagement would have been helpful to the University, especially since, from 1720, the Arghathelians were in control of the Town Council, the patrons of the University.²⁸⁰

Areskine, however, was not solely motivated by the magnate faction politics of early eighteenth-century Scotland, although, according to Ramsay of Ochtertyre, he encountered "a great deal of obloquy in his own time, on account of the part he acted in public affairs".²⁸¹ He had patriotic concerns, and, in 1737, spoke against the bill directed at punishing Edinburgh after the Porteous Riots.²⁸² Described as "possessed of excellent talents, which were improved by culture", he was serious in his scholarly interests and intellectual pursuits, as his library would suggest.²⁸³ He remained connected with the world of scholarship in Scotland and the Netherlands.²⁸⁴ It is no surprise that he was one of the founding members of the Edinburgh Philosophical Society in 1737. This was a society which gave institutional expression to the new scientific and social ideals of Scotland in the Enlightenment. Membership indicates Areskine's continued concern with the

277 R S S[edgwick], "Areskine, Charles (1680-1763), of Tinwald and Barjarg, Dumfries, and Alva, Stirling (now Clackmannan)", in R Sedgwick (ed), *The House of Commons 1715-1754* (1970) vol 1, 420. For example, he became one of the guardians of Sir Thomas Kirkpatrick of Closburn and his brother William, relatives of his wife. William later succeeded him in the Edinburgh chair, was brought in by him to be MP for the Dumfries Burghs, and married one of Areskine's daughters: see J W Cairns, "The First Edinburgh Chair in Law: Grotius and the Scottish Enlightenment", in R van den Bergh (ed), *Ex iusta causa traditum: Essays in honour of Eric H Pool* (2005) 32 [= (2005) *Fundamina: A Journal of Legal History*] at 39-41.

278 See NLS, Ch 5720; Omond, *Lord Advocates* (n 263) vol 2, 2.

279 Cairns (n 277) at 39-41.

280 See R L Emerson, "Medical men, politicians and the medical schools at Glasgow and Edinburgh 1685-1803", in A Doig, J P S Ferguson, I A Milne, and R Passmore (eds), *William Cullen and the Eighteenth Century Medical World* (1993) 186 at 193-194.

281 Ramsay, *Scotland and Scotsmen* (n 262) vol 1, 103.

282 Sedgwick (n 277) at 420.

283 Ramsay, *Scotland and Scotsmen* (n 262) vol 1, 101.

284 See, e.g. T Johnston to C Mackie, 31 July 1725, EUL, MS La.II.91.B.47, where the Hague bookseller sends his greetings to Areskine.

natural sciences, although the society had a wider focus than this.²⁸⁵ Like his patron Ilay, Areskine was concerned with economic development and improvement.²⁸⁶ Thus, he was a member of the Society of Improvers in the Knowledge of Agriculture.²⁸⁷ He helped promote and was a member of the Board of Trustees for Fisheries and Manufactures.²⁸⁸ He became an extraordinary Director of the Royal Bank of Scotland.²⁸⁹ It is surely a measure of Areskine's intellectual qualities that, in 1748, David Hume entrusted him with discretion to decide on the inclusion of an essay in the next edition of his *Essays, Moral and Political*.²⁹⁰ It was perhaps more typical when his patron Ilay, now Duke of Argyll, wrote to him for advice on a Scottish case on appeal before the House of Lords.²⁹¹

This is not the place to pursue Areskine's subsequent career as lawyer and politician, but a brief outline may be useful.²⁹² He resigned the office of Lord Advocate in 1742, when the fall of Walpole brought the Squadrone to power in Scotland, and he lost his seat in Parliament.²⁹³ In 1744, he was appointed to the bench, taking the title Lord Tinwald, after the Dumfriesshire estate he had acquired in 1724, and where he had employed William Adam to design him a small, elegant classical country house.²⁹⁴ Ramsay stated that Areskine had "a great name as a man of taste".²⁹⁵ In 1748 he succeeded Lord Milton as Lord Justice-Clerk. His patron the Duke of Argyll had wanted him to become Lord President but could not achieve it (Presidency of the Session went instead to Areskine's cousin Robert Dundas).²⁹⁶ He later had to sell Tinwald, "though passionately fond of the place", in order to purchase the family estate of Alva from his nephew, Sir

285 See R L Emerson, "The Philosophical Society of Edinburgh, 1737-1747" (1979) 12 *British Journal for the History of Science* 154 at 190.

286 See Shaw, *Management of Scottish Society* (n 71) 118-143.

287 See "A List of the members of the Society", in *Select Transactions of the Honourable the Society of Improvers in The Knowledge of Agriculture in Scotland* (1743) xviii.

288 Shaw, *Management of Scottish Society* (n 71) 124.

289 Shaw, *Management of Scottish Society* (n 71) 131.

290 D Hume to C Erskine, 13 Feb 1748, in J Y T Greig (ed), *The Letters of David Hume* (1932) vol 1, 111-113.

291 Argyll to Charles Areskine, 20 Mar (ny), NLS, MS 5087, fol 196.

292 On Areskine's subsequent career, see Omond, *Lord Advocates* (n 263) vol 2, 1-3; Shaw, *Management of Scottish Society* (n 71) 68-81. Much can also be easily gathered from the Erskine Murray and Paul Papers in the NLS. On Areskine's work as Solicitor General and Lord Advocate, see NLS, MS 5074. His intimacy with Ilay/Argyll is very evident.

293 See, e.g., Sedgwick (n 277) at 420.

294 Omond, *Lord Advocates* (n 263) vol 2, 3; J Gifford, *Dumfries and Galloway* (The Buildings of Scotland, 1996) 551-553. On the acquisition of Tinwald, see the Inventory of Writs, dated 3 July 1729, in NLS, MS 5114, fol 74. Areskine still continued to use the territorial designation "of Barjarg" into the 1730s.

295 Ramsay, *Scotland and Scotsmen* (n 262) vol 1, 106.

296 Sedgwick (n 277) at 420. See also HMC, *Report on the Manuscripts of the Right Honourable Lord Polwarth, formerly Preserved at Mertoun House, Berwickshire and now in the Scottish Record Office, Edinburgh, Volume V, 1725-1780* (1961) 265-266.

Henry Erskine;²⁹⁷ thereafter he was designed as “of Alva”, which is the designation found on his bookplate.²⁹⁸

Ramsay of Ochtertyre summed Areskine up as “not only an eminent lawyer and judge, but likewise a polite scholar, and an elegant speaker and writer”.²⁹⁹ Much later A F Tytler, Lord Woodhouselee, assessed Areskine thus:³⁰⁰

As a lawyer, he was esteemed an able civilian: he spoke with ease and gracefulness, and in a dialect which was purer than that of most of his contemporaries: As a Judge his demeanour was grave and decorous, and accompanied with a gentleness and suavity of manners that were extremely ingratiating.

Ramsay and Tytler discussed Areskine using the language of “politeness”. This was perhaps not inappropriate for a man who owned Shaftesbury’s *Characeristicks*.³⁰¹ Their representation of Areskine is very much as a man of polish, elegance, and grace. This undoubtedly states more about their values than about Areskine, a man of an earlier generation. On the other hand, their image of him undoubtedly reflected aspects of his public personality and of his politics. As an advocate, he was “cool and composed in debate”, with a “graceful persuasive eloquence”; on the bench he had only one equal “in point of dignity, elegance, and decency”.³⁰²

O. CONCLUSION

For some 50 years before 1707 there had been pressure to create a chair or chairs in law in Edinburgh. Carstares can be credited with seizing the opportunity offered by the Union to achieve that ambition. The immediate results might not seem impressive, but they were significant nonetheless. Carstares showed that it was possible to appoint from within Scotland an able and talented professor. The difficulty was that the discipline of the chair, though undoubtedly attractive to intending lawyers, was not the central discipline of civil law, on which intrants were solely examined for admission as an advocate.

Yet, the new chair was a start. By 1710 Alexander Cunningham’s privilege had expired and the successful private teacher, John Cuninghame, had died. This led the Town Council of Edinburgh to take the initiative and create a chair of Civil

297 Ramsay, *Scotland and Scotsmen* (n 262) vol 1, 107-108.

298 See, e.g. the bookplate pasted into NLS, pressmarks Alva 265, 354.

299 Ramsay, *Scotland and Scotsmen* (n 262) vol 1, 100.

300 [A F Tytler, Lord Woodhouselee], *Memoirs of the Life and Writings of the Honourable Henry Home of Kames, One of the Senators of the College of Justice, and one of the Lords Commissioners of Justiciary in Scotland: Containing Sketches of the Progress of Literature and General Improvement in Scotland during the Greater Part of the Eighteenth Century* (1807) vol 1, 38-39 (while there are some inaccuracies in the account of Areskine, there is no reason to doubt the general assessment).

301 See NLS, MS 3283, 63; Klein (n 185).

302 Ramsay, *Scotland and Scotsmen* (n 262) vol 1, 101-103.

Law, to which they appointed James Craig on 18 October 1710. The new professor was expected to live on his fees, as there was no endowment to support the chair.³⁰³

Craig was one the advocates who had been competing for the deceased Cuninghame's classes.³⁰⁴ Though there is no direct evidence, it is likely that the Town Council was here acting along with William Carstares; it was almost certainly he who secured for Craig on 25 January 1715 a patent as regius Professor of Civil and Canon Law.³⁰⁵ Craig was provided with a salary of £100 from the ale duty in Edinburgh, to take effect from 11 November 1717, when the Act of Parliament allocating the funds from this tax was renewed in 1716.³⁰⁶

On 28 August 1719, the Town Council created a Chair of Universal History to which Charles Mackie, nephew of Carstares, was appointed. A salary of £50 *per annum* was allocated out of the Petty Port Customs until 1 July 1723.³⁰⁷ This fulfilled an ambition of the now-deceased Principal. This is not the place to discuss Mackie's work, but the type of class he taught on universal history, copied from one he had attended in the Netherlands, was attractive to law students. Indeed, in 1721, he offered a course in Roman Antiquities, a subject particularly appropriate for law students, having Thomas Ruddiman print for the class the *Antiquitarum Romanarum brevis descriptio* of Pieter Burman, the professor in Leiden, though without Burman's name on the title page.³⁰⁸

The last chair in law to be established in the eighteenth century came in 1722. The Beer Duties Act of that year renewed Craig's salary of £100, and provided that there be a chair of Universal History and Greek and Roman Antiquities and a chair of Scots Law, each with a salary of £100. The Town Council was to make the first appointments to these two new chairs, but successor appointments to these and that of Civil Law were to be made by the Council on the basis of a list of two names for each provided by the Faculty of Advocates.³⁰⁹ On 28 November 1722, the Town Council created the chair of Scots Law, to which Alexander Bayne was appointed. Bayne had in fact petitioned to be appointed to such a chair, emphasising how the class would help in "qualifieing of writers for His Majesty's Signet". At the same meeting the decision was made to elect Mackie to the new broader chair.³¹⁰

303 ECA, TCM, xxxix, 948-949.

304 *Scots Courant* 3/5 May 1710.

305 NAS, PS3/7, 150. This would have been through Montrose, and was achieved at the same time as the appointment of his nephew Dunlop mentioned above. I shall discuss this elsewhere.

306 Beer Duties Act 1716, 3 Geo I, c 5, s 4.

307 ECA, TCM, xlvii, 47-48.

308 See J W Cairns, "Three unnoticed Scottish editions of Pieter Burman's *Antiquitatum Romanarum brevis descriptio*" (1997) 22 *The Bibliothek* 20.

309 9 Geo I, c 5, ss 3-5.

310 ECA, TCM, xlix, 424-425 (28 Nov 1722).

Until around 1750 it was still common for Scots to study law in the Netherlands.³¹¹ What impact this had on the developing School of Law in Edinburgh is unclear. It does not appear to have discouraged individuals from attending classes in civil law in Edinburgh, which helped both those returning from the Netherlands to prepare for the advocates' examinations, and also those departing to lay a foundation for study abroad. Scots law was also evidently attractive for men aiming at the bar or admission as a writer to the signet or to another professional body of lawyers. On the other hand, Scots may have been willing to postpone study of the law of nature and nations until they had gone abroad, although a private teacher offered such classes in 1732, and George Abercromby, Regius Professor 1735-1759, certainly taught in the late 1730s and 1740s.³¹² The fact that admission as an advocate was based solely on examination in civil law no doubt discouraged individuals from taking a class on the law of nature and nations, especially when similar material was taught from other chairs, particularly that in moral philosophy. It is telling that the class was sizeable and successful when the Faculty of Advocates encouraged intrants to attend in the early 1760s, even announcing that they would examine them on the discipline in the private examinations on civil and Scots law.³¹³

Within fifteen years of the Union, three chairs that were explicitly law chairs and one that serviced the needs of law students had been created. All four had reasonable endowments. This was a viable law school, with a teaching faculty comparable in size to the major law schools on the Continent. Carstares' vision of a law school on the model of the Dutch law schools had been achieved. Legal education was to develop in the universities in Scotland, and law was to be taught as a learned and polite discipline. This was a major success, initially arising out of the political negotiations surrounding the achievement of the Union of 1707. The intellectual significance for Scots law cannot be overestimated.

311 See the remarks in Cairns, "Legal study in Utrecht" (n 69) at 38-39.

312 Cairns (n 277) at 39, 41-43.

313 Cairns (n 277) at 44-45.